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No. 81 5947

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EURUS KELLY WATERS,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether the denial of petitioner's Sixth Amendment right to the assistance of counsel at the committal hearing, a critical stage of criminal proceedings in Georgia, requires reversal of his conviction of a capital offense.

2. Whether petitioner was denied his right to a fair trial and impartial jury by the court's refusal to grant a change of venue after law enforcement officials publicized petitioner's confession to the killing of a prominent and popular member of a small community.

3. Whether petitioner's death sentence, imposed upon a finding of invalid aggravating circumstances, must be vacated.

4. Whether the trial court's failure adequately to instruct the jury concerning its sentencing responsibilities, especially as to the nature and significance of mitigating circumstances, renders petitioner's death sentence cruel and unusual punishment, imposed in violation of due process.

5. Whether the death penalty constitutes cruel and unusual punishment as applied to a mentally ill defendant who became completely distraught when he learned he might have "hurt someone."

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STATE OF GEORGIA,

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PETITION FOR WRIT OF CERTIORARI
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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on October 8, 1981.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at ___ Ga. ___, 283 S.E.2d 238 (1981) and is set out in Appendis A hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on October 8, 1981 and is set out in Appendix A hereto. A timely petition for rehearing was denied on October 27, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner asserting deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, "

the Fifth Amendment to the United States Constitution, which provides in relevant part:

> "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...,"

the Sixth Amendment to the United States Constitution, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

and the Fourteenth Amendment ot the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law ..."

This case also involves provisions of the Code of Georgia, the text of which are set out in Appendix B hereto.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia, entered on October 8, 1981, affirming petitioner's conviction of two counts of murder and sentence to death by a Glynn County jury on January 24, 1981. Petitioner, Eurus Kelly Waters, was sentenced to die upon his conviction of the shooting death of two women on Jekyll Island, off the coast of Georgia.

The two women, Kathryn Ann Culpepper and Anita Lynette Paseur, had been fishing in the New Marina area on April 25, 1980.

At about 4 p.m. they returned to Ms. Culpepper's car, where they were accosted by petitioner. (T. 636-37*) Ms. Culpepper, who survived the shooting but died five days later, described her attacker as a "sickly, weakly acting person.". (T. 644) Petitioner forced the women, at gunpoint, about 100 yards into the woods, where he made them handcuff each other together, had oral sex with Ms. Culpepper, and then, when they assertedly lurched towards him, shot them, Ms. Paseur in the head, killing her instantly, and Ms. Culpepper in the chest. Ms. Culpepper was able to return to her car and report the crime; she died five days later from complications following surgery (T. 637, 643).

Petitioner Kelly Waters became extremely emotional and upset when his wife, Helen Waters, told him a few days after the killings that he appeared to fit the description of the man being sought in connection with the Jekyll Island murders. (T. 1119-1121). Petitioner asked her to call his sister, Judy Petty. Ms. Petty, a registered nurse at Brunswick Memorial Hospital, described her brother's condition that evening:

> He was in a shape that I have never seen him in before...I guess despair is the best word I can use to describe it...He was just trembling all over and the tears were streaming down his face...He said, "Baby, sister, I think I may have hurt somebody."... He was just in the very pits of despair, and he said, "I've got to know. I've got to know what happened." (T. 1086-1088)

Petitioner cried uncontrollably most of the rest of the evening, and said he wanted to die if he had done the killing (T. 1065, 1121).

Petitioner's family spent the next several days trying to find out what might have happened. Petitioner had been diagnosed in 1978 as a schizophrenic, paranoid-type, who

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* Numerals preceded by "T" refer to the transcript of the trial, held January 19-24, 1981.

required coninuous treatment with potent anti-psychotic medication to sustain a normal level of functioning (T. 951-2, 1027-1031). Petitioner had attended the Waycross Mental Health Clinic as an outpatient from 1978 until March, 1980, receiving his medication and supportive therapy, and his sisters took him to the clinic the morning following his discovery that he might have "hurt somebody"(T. 914-917,923, medical records). The nurse gave him a long-term tranquilizer (T. 923-924).

Petitioner had stopped taking his anti-psychotic medication one to three weeks before the shooting (T. 788, 1181). He was also drinking during the week of the shootings (T. 785-786, 1152).

Dr. Miguel Bosch, director of the forensic unit at Georgia State Hospital, who examined petitoner in connection with this case pursuant to court order, described the possible effects of ceasing medication, particularly when combined with drinking:

> The reaction that he may have is not good at all. It's going to get worse. What is going to happen to him is not good at all, you're talking about near, a person near to the psychotic, he didn't take his medicine and drinks alcohol, it is possible to have a severe reaction to it. (T. 982).

Petitioner's sister, Judy Petty, sought help from an acquaintance, Police Officer Ed Dixon, in trying to establish whether her brother could have committed the crime. After several attempts she finally reached him on May 3, and asked him to pick up petitioner's gun so that it could be tested for comparison with the bullets used in the killings (T. 719-722). The comparison was not conclusive (T. 740-745).

THE ARREST AND CONFESSION

On May 5, 1980, special agent Scott Curley, in charge of the investigation, came to petitioner's home with Detective Wofford. Petitioner accompanied the officers to the State Patrol Station, where petitioner, after being given the Miranda warnings, said that he did not remember much about the week of the murders, since he was in a "blackout period." (T. 755-777). He admitted that he had a gun (which had already been surrendered to the police), holster and ammunition, and agreed to return to his house to give the officers the clothing he had worn on the day the killings took place. His wife turned over his holster and ammunition. (T. 779-781). Petitioner was formally arrested at 4:15 p.m. on that Monday, May 5, 1980 and was placed in custody at Hinesville Liberty Jail. (T. 782).

Two days later, petitioner was brought before Magistrate Grimes for his committal hearing, held from 10 to 11 a.m. on May 7, 1980.* Petitioner was not represented by counsel at this hearing, and after being committed on the murder charges, petitioner was returned to jail, where he was again questioned, in the absence of an attorney, by the detectives (T. 783). At this time he made a full confession (T. 785-791, 795-798). Detective Curley said he had reiterated the Miranda warnings to petitioner, who agreed to answer questions but refused to sign a waiver of counsel form or sign his statement (T. 805-806). The officer decided not to use a tape recorder because he thought petitioner would have been reluctant to talk with a recorder present (T. 805).

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* Present counsel has been unable to secure a transcript or abstract of proceedings of this hearing, despite the efforts of trial counsel to obtain it. Magistrate Grimes is now deceased.

When counsel was assigned to represent petitioner about a week later, he made a motion to suppress the admission. Petitioner testified at the Jackson-Denno hearing that he asked for a lawyer on May 7; the detectives said they were trying to get one and continued with their questioning. (H. 25-26, 27).* Petitioner also stated that he was on 200 mg. of Mellaril at the time of the interrogation (H. 28).

THE MOTION FOR A CHANGE OF VENUE

Counsel moved for a changed venue. The killings occurred on Jekyll Island, a small community in Glynn County containing 600 homes. At a hearing on the venue motion, counsel introduced 48 articles that had appeared in newspapers with local circulation in Glynn County (V. 7-8, 19, 33-35).** On April 26, April 28 and May 1, 1980, the Brunswick News published articles describing an intensive manhunt for the killer, including sketches of a man resembling petitioner. The Glynn County Board of Commissioners offered a $1000 reward for information leading to the arrest and conviction of persons responsible for the killings. On May 6, the Brunswick News, under a bold headline, reported petitioner's arrest. On may 9 and May 14, the same newspaper, using information obtained from the Glynn County District Attorney, reported that petitioner had confessed. On June 6, 1980, the paper carried an advertisement, placed by the family of Ms. Culpepper, expressing appreciation for the community's support in their ordeal (Defense Exhibits 32-34).

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* Numerals preceded by "H" refer to the minutes of the Jackson-Denno hearing, held December 16, 1980.

** Numerals preceded by "V" refer to the minutes of the change of venue hearing, held December 2, 1980.

The State took unusual security precautions at trial (T. 63-69), including the detention of petitioner in a jail outside Glynn County (T.66).

As the verdict and sentence were about to be announced, the presiding judge cautioned spectators against emotional outbursts (T. 1291, 1368-69). Nevertheless, as reported in the Atlanta Constitution and the Brunswick News of January 26, 1981, Kathryn Culpepper's husband dived across a railing at petitioner and had to be restrained by some of the numerous county policemen and state troopers guarding the courtroom.

THE COURT'S CHARGE

Petitioner was convicted of two counts of murder (T. 1291).

The court's charge to the jury at the penalty phase comprises eight and one half pages of the transcript (T. 1356-1365). The bulk of the instructions concerned the various statutory aggravating circumstances, defining various terms used in the aggravating circumstances alleged to be present, and emphasizing that the jury must write out their recommendation of the death penalty and the statutory factors on which they relied (T. 1356-1361). The court stated that aggravating circumstances must be proven beyond a reasonable doubt but did not instruct the jury that they had to be unanimous regarding which aggravating circumstances applied (T. 1357-1358).

The charge concerning the possibility of a life sentence consisted, in its entirety, of the following four paragraphs:

> The other punishment which you may recommend, as to each Count in this case, is life imprisonment. If you do not believe beyond a reasonable doubt that this Defendant should be put to death, you may return your verdict in the following manner:

> "We, the Jury, find that the Defendant should be sentenced to life imprisonment on each Count." And the effect of this sentence would be that the Court would sentence this accused to life imprisonment on each count...
>
> Now, Members of the Jury, you should, you should consider all evidence submitted in the trial of this case in arriving at your verdict as to the sentences to be imposed. This would include any evidence of mitigating circumstances received by you in this case.
>
> Even if you find beyond a reasonable doubt that the State has proved the existence of an aggravating circumstance or aggravating circumstances in this case which would justify the imposition of a death sentence, you are not required to recommend that the accused be put to death. You would be authorized under these circumstances to recommend the death penalty, but you are not required to do so. The sentence to be imposed in this case is a matter entirely within your discretion and you may provide for a life sentence for the Defendant for any reason that is satisfactory to you or without any reason if you care to do so.
>
> The law vests the exclusive right with the Jury to either make or withhold a recommendation for the death sentence. (T. 1361-1363).

The court added that if the jury failed to find at least one of the aggravating circumstances, they could not impose death (T. 1363). The judge then reiterated, twice more, that the law required written designation of the aggravating circumstances if the jury recommended the death penalty (T. 1363-64).

The jury recommended the death penalty and found that the murder of Ms. Paseur (Count one) was committed under the following aggravating circumstances:

(1) The offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Kidnapping with bodily injury to Kathryn Ann Culpepper. (2) The offense of murder was committed while the offender was engaged in the commission of another capital felony, the murder of Kathryn Ann Culpepper, a human being. (3) The offense of murder was committed while the offender was engaged in the commission of another capital felony, the aggravated sodomy of Kathryn Ann Culpepper. As to Count Two, the murder of Kathryn Culpepper, the jury found the same aggravating circumstances, substituting the name Anita Lynette Paseur for Culpepper's name in the first two circumstances (T. 1369-70). The jury did not find, although they were instructed on the grounds, that the murders were committed during the course of a robbery, nor that they were outrageously and wantonly vile, horrible and inhuman in that they involved torture and depravity of mind. (T. 1358-60, 1369-70).

On direct appeal, the Supreme Court of Georgia held that the third aggravating circumstance as to each count could not be sustained, since the aggravated sodomy statute never provided for the death penalty (Sl. op. at p. 22-23). The court also set aside the aggravating circumstance, under Count two, that Ms. Culpepper's murder was committed during the murder of Ms. Paseur, on the theory that the two such aggravating circumstances were mutually sopporting (Sl. op. at p. 22).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. A motion for a change of venue was made, and denied in the trial court. The Supreme Court of Georgia considered and rejected petitioner's argument that the denial of a change of venue deprived him of a fair trial. (Sl. op. pp. 10-12).

2. Petitioner challenged the admissibility of his post-committal hearing confession in the trial court. Petitioner did not specifically raise the Sixth Amendment argument; petitioner respectfully submits that in a death case, such a fundamental deprivation constitutes plain error that should be reviewable by this Court.

3. The Supreme Court of Georgia set aside three of the aggravating circumstances found by the jury, but determined that the failure of these circumstances did not taint the proceedings so as to invalidate the death sentence. (Sl. op. at. pp. 22-24). It also held that "[u]pon review of the entire transcript and record of this case, this court concludes that the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor." (Sl. op. at p. 24).

4. The Supreme Court of Georgia held the charge sufficient in its reference to mitigating circumstances (Sl. op at p. 24).

5. The Supreme Court of Georgia concluded that the death sentences were not excessive or disproportionate, taking into consideration both the crime and the defendant (Sl. op. at pp. 25-26).

REASON FOR GRANTING THE WRIT

I

DENIAL OF PETITIONER'S SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL AT THE COMMITTAL HEARING, A CRITICAL STAGE OF THE CRIMINAL PROCEEDINGS IN GEORGIA, REQUIRES REVERSAL OF HIS CONVICTION OF A CAPITAL OFFENSE.

Petitioner, charged with two counts of murder, was taken before a magistrate for a hearing to determine whether there was probable cause to bind him over to the grand jury. (H. 13-15; Ga. Code. Ann §27-407.) Petitioner, who had been arrested two days earlier, was not represented by counsel at this proceeding. In a capital case, the absence of counsel at this critical stage of the criminal proceedings vitiates any subsequent conviction, even without a showing of prejudice. See Hamilton v. Alabama, 368 U.S. 52 (1961). Petitioner was, however, prejudiced by the State's failure to assign an attorney to him at the hearing. After he had been committed by the magistrate, petitioner was returned to jail, where, upon interrogation in the absence of counsel, he made a full confession which was entered into evidence at his trial. Petitioner submits that the right to counsel once criminal proceedings have been formally initiated in a capital case should not be waivable in the absence of an attorney. See Estelle v. Smith, ___U.S. ___, 101 S. Ct. 1866, 1876, (1981); Powell v. Alabama, 287 U.S. 45, 57 (1932); see also People v. Samuels, 49 N.Y. 2d 218 (1980). However, even if waiver is permitted without the "guiding hand of counsel," the State here fell far short of its burden of establishing "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst 304 U.S. 458, 464 (1938).

The committal hearing in Georgia has been held by the state's highest court to be a critical stage of the criminal proceedings, entitling the defendant to the assistance of counsel.

State v. Houston, 234 Ga. 721, 218 S.E. 2d 13 (1975); see also Coleman v. Alabama, 399 U.S. 1 (1970). Indeed, the statute providing for such a hearing contains numerous indications of its adversarial nature. Both the prosecutor and the defendant are to be given time to prepare the case, "and in no event shall the defendant be forced to trial without the aid of counsel, if there be a reasonable probability of his securing counsel without too great delay..." Ga. Code Ann. §27-403. The court has the power to compel the attendance of witnesses (Ga. Code Ann. §27-404) and a defendant has the right to testify (Ga. Code Ann. §27-405). An abstract of the evidence is required to be made whenever the charge is a felony. Ga. Code Ann. §27-406.

The critical importance of this initial, but in scope far-ranging, evidentiary hearing is potentially at least as great as a defendant's arraignment on a capital charge. Under the authority of Hamilton v. Alabama, 368 U.S. 52 (1961) and White v. Maryland, 373 U.S. 59 (1963), the absence of counsel at such a preliminary hearing violates due process even without a showing of prejudice.

Petitioner here was harmed by the failure to assign counsel at the committal hearing. Beyond the somewhat intangible prejudice of a lost opportunity to examine the state's witnesses, petitioner's confession on the afternoon after the hearing would in all likelihood not have taken place had he been represented by counsel. The Supreme Court of Georgia itself has recognized that such admissions could render the absence of counsel at a committal hearing reversible error. See State v. Hightower, 236 Ga. 58, 222 S.E. 2d 333 (1976).

Finally, even if petitioner could have waived his right to an attorney at the committal hearing, the State has failed utterly to how that he made such a knowing waiver. The State's sole evidence on the issue consisted of Detective Curley's assertions that he advised petitioner of his Miranda rights, and that petitioner agreed to talk. Petitioner refused to sign a waiver of counsel form. He was taking powerful anti-psychotic medication. Petitioner asserted at the Jackson-Denno hearing that he had requested an attorney on the day of the committal hearing. Under all these circumstances, the State has failed to meet the strict standard for establishing a waiver of the right to counsel at this critical stage of pretrial proceedings. Brewer v. Williams, 430 U.S. 387, 404 (1977); see also United States v. Mohabir, 624 F. 2d 1140 (2d Cir. 1980).

II

THE COURTS BELOW VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY BY REFUSING TO GRANT A CHANGE OF VENUE AFTER LAW ENFORCEMENT OFFICIALS PUBLICIZED PETITIONER'S CONFESSION TO THE KILLING OF A PROMINENT AND POPULAR MEMBER OF A SMALL COMMUNITY.

The court should grant certiorari to determine whether the Georgia court's refusal to grant petitioner a change of venue violated due process.

The Fourteenth Amendment mandates trial by an impartial jury in any state criminal proceeding which, were it be tried in federal court, would come within the Sixth Amendment jury trial guarantee. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). Where prejudicial pretrial publicity prevents the selection of an impartial jury, denial of a change of venue violates due process. Juelich v. United States, 214 F. 2d 950, 956 (5th Cir. 1954). Even in the absence of a venue motion, prejudicial publicity may constitute an independent due process violation. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Moreover, since prior restraints upon press coverage "are the least tolerable infringement on First Amendment rights," Nebraska Press Association v. Stuart, 427 U.S. 539, 559, (1976) change of venue will often be the only constitutional route to a fair trial. Id at 563, 564.

Despite the importance of change of venue to due process guarantees, the Georgia courts have severely limited its availability. See Coleman v. State, 237 Ga. 84,90, 225 S.E. 2d 911 (1976). In the instant case, three of these limitations violated due process: 1) the application of a standard of review which allows reversal only upon a showing that the trial court abused its discretion, 2) the requirement, pursuant to Georgia statute, that movant demonstrate actual prejudice and 3) the failure, at both the trial and appellate level, to consider facts strongly supportive of petitioner's motion.

The Georgia Supreme Court applied the Georgia rule that a denial of motion for a change of venue will be disturbed on appeal only upon a showing that the trial court abused its discretion. Waters v. State, ___Ga.___,___, citing Coleman v. State, supra 237 Ga. at 90. This Court's opinion in Sheppard, v. Maxwell, 384 U.S. 333 (1966) clearly implies that due process cannot be satisfied by such a cursory review, for:

> (g)iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts should take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. (emphasis added). Id at 362.

While no motion for change of venue was raised in Sheppard itself, the California Supreme Court has directly applied Sheppard's reasoning to a change of venue case. Maine v. Superior Court of Mendocino County, 68 Cal. 2d 375, 382, 66 Cal. Rptr. 724,438 P. 2d 372 (1968). Granting writ of mandate to compel change of venue, the court held that

> appellate courts must, when their aid is properly invoked, satisfy themselves de novo on all the exhibits and affidavits that every defendant obtains a fair and impartial trial. Id. at 382.

The Georgia Supreme Court undertook no independent evaluation of the circumstances. It considered none of the evidence presented at the hearing on change of venue, confining itself, instead to the jurors' responses on voir dire. The court apparently assumed that voir dire is "an accurate barometer of public sentiment" [American Bar Association, Mininum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, Commentary to Standard 8-3-3, Vol. B, p.40] (1980), despite that fact that this assumption has been questioned. Id at 40. Where the defendant's life is at stake, the Court has been particularly sensitive to irsure that every procedural safeguard has been observed.

Powell v. Alabama, 287 U.S. 45, 71 (1932). Therefore, the Georgia Supreme Court's failure to undertake de novo review of denial of a change of venue, in a capital case, violated petitioner's Fourteenth Amendment right to trial by an impartial jury. The Court should grant certiorari to consider whether to reverse and remand to the Georgia Supreme Court for application of the constitutionally appropriate standard of review.

Moreover, the Georgia law places an unfair burden on a defendant moving for change of venue. Under Georgia law, defendant must prove prejudice by clear and convincing evidence. Change of venue may be granted only where the trial court is satisfied that a fair trial cannot be had. Ga. Code Ann. §27-1201. Therefore, Georgia law requires a showing of actual prejudice to a degree which renders a fair trial not merely improbable, but impossible. Shinholster v. State, 150 Ga. App. 221, 221, 257 S.E. 2d 342 (1979). The vast majority of jurisdictions, and the trend of enlightened opinion, reject this standar A.B.A. Minimum Standards, supra Standard 8-3.3. In most jurisdictions, movant is required to demonstrate reasonable likelihood of prejudice and no showing of actual prejudice is required. *

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* See generally, 33 A. L.R. 3d 17 (1970) and cases cited therein at p. 31.

Therefore, the Court should grant certiorari to consider whether a defendant, particularly an indigent defendant, can be constitutionally required to demonstrate actual prejudice by clear and convincing evidence such that a fair trial cannot be had.

Under whatever standard, the Georgia courts failed to consider several factors pertinent to the assessment of change of venue. These factors have been summarized as follows: 1) the extent of pre-trial publicity 2) the nature of the pre-tiral publicity 3) the nature of the community which was subject to the pre-trial publicity and where the trial was scheduled to take place 4) the source or sources of the pre-trial publicity, including the possibility of prosecutorial misconduct, in creating an atmosphere of hostility toward the accused. Commonwealth v. Casper, 375 A. 2d 737, 743 (Pa. Super. Ct. 1977). In the instant case, consideration of all factors supports the conclusion that, in the absence of a change of venue, a fair trial could not be had.

The publicity complained of included newspaper articles in three separate newspapers circulated in the community, and several broadcasts on a popular radio show. (V. 8, 19, 35, 45-61). Second, the publicity included a report of defendant's confession. (Brunswick News May 9, 1980) (Ex. D-25). It has been held that whenever a confession is featured in news media coverage of a prosecution, change of venue should be granted where requested. Oliver v. State, 250 S. 2d 888, 890 (Fla. 1971). Third, the trial occurred in a community of 18, 557 residents. One of the victims was a popular and prominent resident of the community, whose death, several days after the shooting, became the focus of a laudable outpouring of community warmth and sympathy. (Brunswick News June 6, 1980) "(P)ervasive civic involvement in the fate of the victim, particularly when the events all transpire in a relatively small community, is a strong indication that venue should be changed."

Maine, supra 68 Cal. 2d 375 at 385, n. 10. Fourth, the Glynn County District Attorney provided the report of defendant's confession to the news media (T.23). If prejudicial publicity emanates from the police or prosecution, and not from an independent source, "the government can hardly complain of inconvenience (caused by change of venue) if it was responsible for the dissemination of the damaging material." United States v. Bonanno, 177 F. Supp. 106,122, reversed on other grounds sub. nom. United States v. Buffalino, 285 F. 2d 408 (2d Cir. 1960). That at least some elements in the community felt hostility to the defendant is amply demonstrated by the unusual security precautions taken at the trial (T.63-69), including the detention of defendant in a place outside Glynn County (T.66), as well as by the cautionary instructions issued by the trial judge when the verdict and sentence were about to be announced (T. 1291,1368). Finally the Georgia Supreme Court failed to consider the magnitude of the crime charged, murder, and the severity of the penalty, death, as bearing on the likelihood of partiality. See Maine, supra 68 Cal. 2d 375 at 385. Therefore the Court should grant certiorari to consider whether where defendant's confession is disseminated to a small community by the prosecution, and where the offense charged is the murder of a popular and prominent member of that community, denial of a motion for change of venue violates due process.

Both of the courts below placed too great weight on the one factor they did consider, the jurors' responses on voir dire. The Georgia Supreme Court stressed the small number of jurors confessing to prejudice and the fact that all these were eventually excluded by peremtory challenge. The unreliability of voir dire responses was noted in State v. Shawan, 77 N.M. 354, 358, 423 P. 2d 39 (1967). To expect a juror to confess prejudice is not always a reliable practice, since even a prejudiced juror could be completely honest in denying prejudice. "All looks yellow to the jaundiced eye." Id at 358.

Particularly in the context of the proper standard of review, petitioner's failure to use one of his peremptory challenges cannot constitute ground for holding a change of venue unwarranted. For,

> (e)xperience shows that ...(d)efense counsel is placed in an unnecessarily awkward position: unless he exhausts all his peremptory challenges he cannot claim on appeal, in the absence of a specific showing of prejudice, that the jury was not impartial. Yet, convinced that he must go to trial because his motion for a venue change was at first denied and in all likelihood will not prevail, he may fail to use every peremptory challenge, sensing that the jurors he has examined may be comparatively less biased than other who may be seated were his peremptory challenges exhausted. Maine, supra 66 Cal. 2d 375 at 380.

Therefore, despite petitioner's failure to use all his challenges or renew motion for change of venue after voir dire, denial of his initial motion violated due process.

III

SINCE THE JURY CONSIDERED AND FOUND AGGRAVATING CIRCUMSTANCES THAT HAVE BEEN DECLARED INVALID, PETITIONER'S DEATH SENTENCE CANNOT BE PERMITTED TO STAND.

The jury was led to believe that the aggravated sodomy committed on one of the victims constituted an aggravating circumstance that would justify imposition of the death penalty. As the Supreme Court of Georgia correctly held, however, aggravated sodomy is in no sense a capital offense, therefore a killing committed during the course of an aggravated sodomy cannot be punished by death. Since it is impossible to determine whether or to what extent the jury relied on this invalid aggravating circumstance in arriving at its decision to recommend the death penalty, the sentence must be set aside. See Stromberg v. California, 283 U.S. 359 (1931); Street v. New York, 394 U.S. 576 (1969).

The Supreme Court of Georgia erred when it upheld petitioner's death sentence based on the other aggravating circumstances found by the jury. See Stephens v. Zant, 631 F. 2d 397 (5th Cir. 1980), cert. granted ___ U.S.____, October 5, 1981. The mere fact that a valid statutory aggravating circumstance may have been present did not require the jury to recommend the death penalty. In theory, the jury considered both aggravating and mitigating circumstances (but see Point IV below regarding the likelihood that this jury made such an inquiry) before coming to its determination that petitioner should die. Even if the jury was unanimous in finding all the aggravating circumstances (which it was not told to be required), different members of the jury may have used different factors in making the decision to impose death. Certainly no reviewing court can declare, with the degree of certainty required in death cases under the Eighth Amendment, that the

invalid aggravating circumstance played no role in the decision to recommend a death sentence. See Woodson v. North Carolina, 428 U.S. 280, 303 (opinion of Stewart, Powell and Stevens, JJ.) (1976); Stephens v. Zant, supra, 631 F. 2d at 406.

Affirmance of petitioner's death sentences on the basis that a valid aggravating circumstance remained violates the principle announced by this Court that mandatory death sentences are impermissible under the Eighth Amendment. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). The reviewing court's cavalier dismissal of the fact that the jury was told it could consider an invalid factor in deciding to impose death can only be justified if the presence of an aggravating circumstance requires imposition of a death sentence; it is totally inconsistent with the notion that the jury must balance aggravating and mitigating circumstances, retaining at all times the option to recommend life imprisonment. The presence of an invalid aggravating circumstance injected into the jury's deliberations the kind of an "arbitrary factor" expressly condemned by the Georgia statute in compliance with this Court's ruling in Furman v. Georgia, 428 U.S. 153, 204.

IV

THE TRIAL COURT'S FAILURE ADEQUATELY TO INSTRUCT PETITIONER'S JURY CONCERNING ITS SENTENCING RESPONSIBILITIES UNDER GA. CODE ANN. § 27-2534.1(b) -- ESPECIALLY AS TO THE NATURE AND SIGNIFICANCE OF MITIGATING CIRCUMSTANCES -- RENDERS PETITIONER'S DEATH SENTENCE CRUEL AND UNUSUAL PUNISHMENT, IMPOSED IN VIOLATION OF DUE PROCESS OF LAW

The court should grant certiorari to consider whether the mere mention of the words "mitigating circumstances" can, without more, fulfill a trial court's constitutional duty to guide a jury in its exercise of sentencing discretion in a capital case.

A death penalty statute permitting a jury to decide, arbitrarily and without legislative guidance, whether a defendant is to live or die violates the Eighth and Fourteenth Amendments to the Constitution. Furman v. Georgia, 408 U.S. 153, 238, 314 (1972) (White J., concurring). In Gregg v. Georgia, 428 U.S. 153 (1976) the Court held Georgia's present statute constitutional partly because "in the assessment of the appropriate sentence to be imposed the judge is ... required ... to include in his instructions to the jury 'any mitigating circumstances' ". Id. that a proper charge should include specific circumstances to be considered in mitigation:

> These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends a sentence...the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any facts about this defendant that mitigate against capital punishment (e.g. his youth, the extent of his co-operation with the police, his emotional state at the time of the crime). As a result, while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.' Id. at 197-98.

Although Georgia's death penalty statute, Ga. Code Ann. §27-2503 and 2534.1 contains detailed lists of aggravating

circumstances, the Court apparently trusted the Georgia courts to include specific mitigating circumstances in their charges. Indeed, the Court suggested several examples. As to petitioner, Gregg's promise of guided jury discretion has been betrayed.

The trial court's sentencing instructions violated Furman and Gregg in three respects. First, the instructions did not define "mitigating circumstances" for the jury. Some members of a jury "who had never before made a sentencing decision", Gregg, supra, 428 U.S. at 190, might not have understood the meaning of the word "mitigating". Moreover, the court's failure to define mitigation stands in stark contrast with its explicit and extensive deninitions of all aggravating circumstances charged. The court gave no examples of mitigating circumstances. Nor did it inform the jury of its duty to undertake a "particularized consideration of relevant aspects of the character and record of each convicted defendant." Woodson v. North Carolina, 428 U.S. 280, 302,303 (Stewart, Powell, Stevens, JJ.) (1976). The subject was simply not covered.

Second, the trial court failed to include in its instructions to the jury several mitigating factors actually present. For example, the State's own psychiatrist testified that petitioner had been suffering for several years from paranoid-schizophrenia. He was only able to function while under medication -- medication which he did not take on the day of the killings. While this evidence may not have sufficed to meet Georgia's McNaghton test for insanity, it did establish diminished mental capacity. Diminished mental capacity is widely recognized as a mitigating factor in capital cases. A substantial majority of American jurisdictions retaining the death penalty specify that the sentencer must give mitigating consideration to evidence of the defendant's mental or emotional distrubance. See Liebman and Shepard, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate":

Mental Disorder as a Mitigating Factor, 66 Geo. L. J. 757, 794 n. 158 (1978). The trial court should have informed the jury in terms as strong as those used in connection with the aggravating circumstances that petitioner's state of mind and mental history could militate against imposition of the death penalty.

Additionally, uncontested evidence of petitioner's prior character and record might well have convinced a jury, properly informed as to the pertinence of that background, that petitioner did not deserve to die. Petitioner, 36 years old, had no prior convictions. His only prior contact with the law consisted of two suicide attempts and a stint as county jailer. He was employed at the time of his arrest, and had labored as a preacher of the gospel. The circumstances of his life might well have suggested to the jury that his actions were a tragically inexplicable deviation from of lifetime of obedience to the law and service to society, unlikely to be repeated. Therefore the court erred in failing to charge defendant's character and record as a mitigating circumstance.

Moreover, unrefuted evidence demonstrated that, on the day of the killings, petitioner had withdrawn from his medication and had been dirinking heavily. In Harry Roberts v. Louisiana, 431 U.S. 633,637 (1977) (per curiam) the Supreme Court specifically mentioned "the influence of drugs" as an example of a mitigating circumstance which a capital jury should consider. The Gregg Court itself mentioned the defendant's emotional state at the time of the crime as a mitigating factor. Gregg, supra, 428 U.S. 153 at 198. The trial court erred in failing to charge emotional state as a mitigating circumstance.

The Gregg Court also mentioned the extent of a defendant's cooperation with the police as mitigating. Id. Petitioner went beyond cooperation: his fear that he "may have hurt somebody" led him to insist that the police investigate his possible involvement fully. Again, the trial court erred in failing to charge cooperation as mitigating.

Third, the trial court's instructions were deficient in failing to provide the jury with guidance on the proper relation between aggravating and mitigating factors. See Coker v. Georgia, 433 U.S. 584,589 (1977). The jury was simply told that it should consider "all evidence submitted" and that all evidence "would include any evidence of mitigating circumstances". The jury had no means of knowing that it had a duty to weigh mitigation against aggravation. A jury of people who had never before made a sentencing decision may well have concluded that mitigating circumstances could only be considered if they found no aggravating circumstances.

As the Court of Appeals for the 11th Circuit has recently reaffirmed:

> ....Lockett and Bell, ... mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death. Chenault v. Stynchcombe, 581 F. 2d 444,448 (5th Cir. 1978)...
>
> In light of Lockett, Gregg, and Chenault, we hold that the Eighth and Fourteenth Amendments require that when a jury is charged with the decision whether to impose the death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender...," Jurek v. Texas, 428 U.S. at 274, 96 S. Ct. at 2957. In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations. Spivey v. Zant, ___ F.2d ___ (Sl. Opin, November 17, 1981).

Therefore, the Court should grant certiorari to consider whether a trial court can possibly fulfill its constitutional duty clearly to instruct a sentencing jury about mitigating circumstances by the mere mention of such circumstances, without definition, examples, or explanation of the role mitigation must play in deciding whether a defendant is to live or die.

V

THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AS APPLIED TO A MENTALLY ILL DEFENDANT WHO BECAME COMPLETELY DISTRAUGHT WHEN HE LEARNED HE MIGHT HAVE "HURT SOMEONE."

It is difficult to imagine that a jury, uninfluenced by the passions aroused in a small community that had lost two respected citizens (see Point II above) and instructed on the proper weight to be given to mitigating circumstances (see Point IV above), would have seen fit to impose the death penalty in this case. The genuineness, severity and long history of petitioner's mental illness was uncontradicted. Regardless of the particular psychiatric label that might be attached to the disorder, it was clear that petitioner could function "normally" only when kept on potent antipsychotic medication. Without the drug, he was likely to become very nervous and depressed, and in extreme cases even go into what he characterized as "black out" periods.

As movingly described by several witnesses, Kelly Waters broke down and cried uncontrollably when he began to suspect that he might have been involved in these killings. No one suggested that his reaction was feigned-even the state's doctors, who testified that he passed the M'Naghten test, agreed that petitioner was at all times honest in his responses. Petitioner apparently did "black out" the entire episode, an episode that took place while he was off medication and after he had consumed a considerable quantity of alcohol. Surely petitioner's mental state at the time of the killings, and his deep despair after discovering what he had done, constitute powerful mitigating circumstances miligating against a death sentence.

Nor are these facts about petitioner's psychiatric background outweighed by the aggravating circumstances found by the jury and upheld by the Supreme Court of Georgia. The statutory aggravating circumstances revolved around the fact that each killing took place during the course of the kidnapping with bodily injury (i.e. death) of the other victim. The jury rejected as an aggravating circumstance the notion that the killings were "outrageously and wantonly vile, horrible and inhuman in that [they] involved torture and depravity of mind." Particularly since the kidnapping was limited to a forced walk of one hundred yards,* it seems apparent that the jury could rely on the almost automatic aggravating circumstance presented by any double homicide. To the extent that the jury relied on the aggravated sodomy, the death sentence suffers from an additional infirmity, as demonstrated in Point III above.

In comparing this death sentence to other "similar" cases, the Supreme Court of Georgia chose cases involving men who sexually assaulted and then killed women, often in particularly gruesome ways.** Since none of the cases involved a

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* Enumeration of Error #13 in the Supreme Court of Georgia argued that insufficient evidence was presented to establish a kidnapping.

** For example, in Gibson v. State, 236 Ga. 874, 226 S.E. 2d 63 (1976) the defendant raped a woman (either before or after death) and shot her in front of her four year old child; in Moore v. State, 240 Ga. 807, 243 S.E. 2d 1 (1978) the defendant and his accomplice robbed a store, abducted the 18 year old salesgirl, raped her then shot her in the face to prevent her features from being identified; and in Westbrook v. State, 242 Ga. 151, 249 S.E. 2d 524 (1978), the defendant and his accomplice raped an elderly widow, forced her to drive to her bank to withdraw money, abducted her and a neighbor to whom she called for help, tied and gagged them in the woods and beat them to death with a two by four piece of lumber.

defendant with a documented history of mental illness, the Supreme Court of Georgia, like the jury, apparently considered this mitigating factor irrelevant to the sentencing decision. The cases are "similar" only to the extent that they ignore entirely the individual characteristics and background of the offender. It is respectfully submitted that the death sentence imposed on petitioner constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

CONCLUSION

For the above-stated reasons, petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

URSULA BENTELE

165 West End Avenue
New York, New York 10023

ATTORNEY FOR PETITIONER

Dated: December 24, 1981

Rec. 10-13
JCB copy

YOU ARE TO NOTIFY
THE INTERESTED PARTIES
DECISION WITHIN 5 DAYS.

In the Supreme Court of Georgia

Decided: OCT - 8 1981

37629. WATERS v. THE STATE

GREGORY, J.

Appellant, Eurus Kelly Waters, was indicted May 13, 1980 for the murders of Anita Lynette Paseur and Kathryn Ann Culpepper. He was found guilty of both murders and sentenced to death. Waters' defense was insanity; the evidence is undisputed that Waters killed Ms. Paseur and Ms. Culpepper.

At 4:33 P. M. on Friday, April 25, 1980, EMT's (Emergency Medical Technicians) with the Jekyll Island Fire Department received a call reporting a shooting at a Phillips 66 station on Jekyll Island. When they arrived at the station, Kathryn Culpepper was sitting in a red AMC Gremlin automobile. She had a gunshot entry wound in her chest and an exit wound in the area of her left kidney. A pair of handcuffs was fastened to her left wrist. As she was being placed into the ambulance, she asked one of the EMT's to get her purse out of the car; however, he was unable to locate it.

A state trooper who had also responded to the call asked Ms. Culpepper what had happened. She told him that while she and [redacted] girlfriend had been fishing, a white male had pulled a gun on them, made them march into the woods, handcuffed them, sexually assaulted her, and then shot both of them. She thought the other woman was dead.

The body of the other woman, Anita Paseur, was found approximately two miles south of the Phillips 66 station in what is known as the New Marina area of Jekyll Island. She was lying on her back, clothed from the waist up, with her bathing suit bottom and shorts pulled down to her ankles. She had a bullet wound in the upper left part of her chest. A later autopsy showed that Ms. Paseur's death resulted from the gunshot wound. A .38 caliber bullet was removed from her during the autopsy. A GBI agent, using a metal detector at the crime scene, found another .38 caliber bullet under some leaves about 10 feet from where Ms. Paseur had been found.

GBI agent Scott Curley talked to Ms. Culpepper in the hospital. He obtained a description of the killer, his car, his gun and holster, and Ms. Culpepper's missing pocketbook. Agent Curley then posted a lookout for a white male in his late thirties, of average height, with light brown hair and light blue eyes, having a country accent, and wearing a light blue shirt, dark blue pants and black shoes; for an older model white, 4-door Pontiac or Buick automobile with a Georgia tag; for a .38 or .357 police-type revolver; for a black leather holster; and for a burgundy colored, John Romain shoulder bag containing personal items belonging to Kathryn Culpepper.

Kathryn Culpepper died April 30. The cause of her death was excessive fluid around the heart and the pericardium, caused by the trauma directly beneath her heart, in the liver and pancreas, which in turn was caused by the bullet wound.

Eurus Kelly Waters was a cab driver in Waycross. He worked half a day Wednesday, April 23 and Thursday, April 24. He did not work at all on Friday.

Dorothy Googe was lying by herself on the beach at Jekyll Island early Friday afternoon. A fully dressed man, wearing long, dark pants, a blue shirt, and black shoes, walked by her toward the picnic area. He returned twice during the next few minutes to show her some shells he had collected. The second time, Ms. Googe told him she didn't want any company. When he approached her a third time, she told him she had to go down to where her husband and son were and she left. The man spoke with a country accent. Ms. Googe later identified Waters, by means of a photographic lineup, as the man on the beach.

Between 4:30 and 5:00 P. M. Friday, Brantley County Deputy Sheriff Jerry Rowell was travelling west on Highway 84. As he came over the top of the Satilla River Bridge, he had to slow down to 20 miles per hour behind a white 4-door 1974 Chevrolet. After following the car for a while, Deputy Rowell, suspecting the driver was intoxicated, stopped the car. When the driver opened his door, Rowell saw a Motorola police-type radio on the transmission hump and asked the driver if he worked for a timber company. The driver told him no, he was a part-time cab driver in Waycross. Deputy Rowell decided the driver was not intoxicated and let him proceed. He later identified Waters, by means of a photographic lineup, as the driver of the car.

On the afternoon of Thursday, May 1, 1980, Ms. Culpepper's burgundy colored, John Romain shoulder bag, containing various credit cards but no cash, was found on

the west bank of the Satilla River just under the Satilla River Bridge.[1] The Satilla River Bridge is 33.2 miles from the New Marina area of Jekyll Island.

Waters told his wife, Helen, when he got home the evening of the 25th that he was late because he had got stuck in the swamp. He went back to work Saturday. Next Tuesday, April 29, Helen Waters read an article in the paper about the murders on Jekyll Island. The article gave a description of the suspect. She turned to her husband and said, "Kelly, this murder, these things that's happened on Jekyll Island, this description fits you." Waters looked at her for a few seconds and then said, "call Judy." When Judy Petty, Waters' sister, arrived, Waters started crying and said, "Sister, I think I may have killed some people. If I have done this thing, I want to die." He continued crying for most of the rest of the evening. Ms. Waters got her husband's gun, which was fully loaded, out of the bedroom dresser and hid it under the sink. A few minutes later, another of Waters' sisters, Georgia Rainey, and her husband arrived. Mr. Rainey got the gun out and smelled it to see if it had been fired. He couldn't smell anything. He unloaded the gun and Ms. Waters hid the bullets under the television and put the gun back under the sink. After some discussion, the family decided not to call the police at that time; Ms. Petty would try to get in touch with a friend of hers, Ed Dixon, a Glynn County policeman, and ask him what to do.

Waters and his wife spent Tuesday night with Judy Petty in Brunswick. The next morning, the three of them went

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1/ Mr. Culpepper's driver's license was found first. The purse was found a few minutes later. In it were Sears, Visa, Phillips 66, J. C. Penney, Texaco, Belk's and Mr. B's Honeytree credit cards, all bearing the name Kathryn Ann Culpepper or Mrs. Richard B. Culpepper.

to the mental health clinic in Waycross that had been treating Waters since 1978. He was given a shot of Prolixin Decanoate, a long term major tranquilizer.[2/] Waters told his family that he wasn't sure where he was Friday but he thought he had got stuck in the swamp and had broken a shovel trying to dig his car out. They went to see if they could find the place. Waters drove to a place showing signs that an automobile had been stuck. Nearby was a broken shovel handle. Waters spent Wednesday night at home.

Ms. Petty finally reached Ed Dixon Saturday, May 3. Sunday afternoon, Waters' pistol was given to Dixon, who truned it over to GBI agent Curley.[3/] Mondsy afternoon Agent Curley and Detective Wofford went to the Waters' residence in Waycross and asked Waters to accompany them to the State Patrol station in Waycross, two or three miles from Waters' house. There, after advising Waters of his rights, Agent Curley interrogated him. Waters said he couldn't really remember what he had done Friday afternoon but thought he may have got stuck in a swamp. He remembered that he had been wearing a light blue shirt, dark blue trousers and black boots. He admitted owning the .38 caliber pistol that had been given to Agent Curley.[4/] He admitted owning a black leather holster and a pair of handcuffs, but he couldn't remember where the cuffs were. He agreed to go back to the house to allow Agent Curley to

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2/ The nurse who gave Waters the injection testified that long term meant at least two weeks and maybe three or four.

3/ A picture of Waters, used in the photographic lineups, was also obtained at this time.

4/ It was shown that the pistol, a Taurus .38 caliber revolver, was purchased by Eurus Kelly Waters on October 14, 1974, from the Sport Shop in Waycross, Georgia.

look at the clothes, the holster and the ammunition for the gun.

They went back to Waters' house. Helen Waters got the ammunition and the holster and gave them to Agent Curley. Waters retrieved a light blue shirt and dark blue pants that he identified as being the ones worn by him on April 25th. At 4:15 P. M., Monday, May 5, 1980, Waters was placed under arrest.

On Wednesday, May 7, 1980, Agent Curley again questioned Waters. Curley told Waters he had been seen on Jekyll Island about 1:00 P. M. April 25th. Waters responded that he had been drinking that week. Agent Curley told Waters he thought Waters had done the killings. Waters looked down and then said, "All right. I'll tell you what I remember. I remember being on the beach that Friday. I remember shooting those two women. I saw them fishing, and I pulled my gun on them and sexually assaulted them. I remembered last night what happened." He went on to say that he saw the two women fishing and watched them a while. As they were getting ready to leave, he walked up to them, pulled his gun out of his hip pocket and made them accompany him into the woods.[5/] He gave the older woman (Ms. Culpepper) the handcuffs and ordered her to handcuff herself to the younger woman (Ms. Paseur). He admitted having oral sex with the older woman.[6/] He said he shot the two women because after he got through with the oldest one, they flinched toward him.[7/] He said he

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5/ Waters testified during the trial that he told them they were going with him or he would shoot them.

6/ The sex act was cunnilingus. Code Ann. § 26-2002 defines sodomy to include both anal and oral sex. Waters testified that while this was going on, Ms. Paseur was hysterically screaming.

7/ Waters testified that Ms. Culpepper had just finished pulling on her clothes when the women made a lunge at him and he shot them. He said he thought he shot Ms. Culpepper first and then Ms. Paseur.

did not touch the younger woman except to tear her clothes off after he shot her. He said that as he left, he got a pocketbook out of their car, took seven dollars out of it, and threw the rest off the Satilla River bridge on the way home. He remembered being stopped by a deputy right after he threw the pocketbook away. When he got home he sprayed his gun with degreaser, reloaded it, and put it up.

Agent Curley showed Waters an aerial photograph of the New Marina area of Jekyll Island. Waters marked on the photograph where he had parked his car and where the women had been fishing. He drew a line indicating his path from the place of abduction to the place where the sex act and killings had taken place.[8/] The last area he indicated was precisely where the body of Ms. Paseur had been found.

Roger Parian of the State Crime Lab examined the bullets and the gun. Five of the six bullets given to Agent Curley by Ms. Waters were Federal brand, .38 caliber Plus P semi-wadcutter hollow point cartridges. The other was a Federal brand, .38 Plus P round-nose lead cartridge. The bullet removed from the body of Ms. Paseur and the bullet found at the murder scene were .38 caliber semi-wadcutter hollow point lead bullets, probably Federal brand. The two death bullets had six lands and grooves with a right-hand twist and were probably fired from a Taurus or Rossi brand revolver. Test bullets fired from Waters' Taurus revolver showed similar lands and grooves but had microscopic striations distinctly different from those on the two death bullets. A subsequent examination of the barrel of Waters' gun with a stereo microscope revealed randomly placed nicks and gouges throughout the barrel, possibly caused by the insertion of a hard object such as a screwdriver into the barrel.

8/ Waters testified at trial that this distance was

Waters' testimony during the trial was basically consistent with hisconfession. Additionally, he testified that he had twice tried to commit suicide. In 1964 he shot himself in the stomach with a .22 caliber rifle. In 1966 he drank a mixture of rubbing alcohol and white linament. He testified that he had been on medication for some time and that if he didn't take the medicine for three or four days, he would get very upset and emotional. He testified that he had not taken his medicine for several days prior to the killings.

Dr. Wiley Lewis began treating Waters in 1978 for an unspecified mental illness whose symptoms included agitation, anxiety, and restlessness. As a part of the treatment, Waters began taking Thorazine. Dr. Lewis testified that the last time he saw Waters, in July, 1979, Waters knew the difference between right and wrong.

On October 30, 1978, Waters went to the mental health clinic in Waycross. The psychiatric nurse who saw him recommended he continue taking his Thorazine and return November 8, 1978 for an evaluation by Dr. Lorenzo Lecumberri. Dr. Lecumberri, a psychiatrist employed by the State of Georgia at the Georgia Regional Hospital in Savannah, examined Waters and diagnosed schizophrenia, paranoid type. He took Waters off Thorazine and put him on Mellaril. Dr. Lecumberri testified that Mellaril improves thought, decreases activity and controls anger and hostility. Dr. Lecumberri last saw Waters November 26, 1979, at which time Waters was not psychotic, was in good contact with reality, and knew the difference between right and wrong.

Waters returned approximately every four weeks to the mental health clinic for medication monitoring until March 19, 1979. He did not return thereafter until April 30, when as previously stated, he was given an injection of Prolixin Decanoate.

After Waters was arrested, he was examined by Dr. Miguel Bosch, a psychiatrist in charge of the forensic psychiatric service at the Georgia Regional Hospital in Savannah, and Jerry Bowman, a psychologist for the forensic services program at the same hospital. Dr. Bosch concurred in the previous diagnosis of paranoid schizophrenia. However, he found Waters to be well oriented as to time, place, person, and situation. Waters' speech was coherent, relevant, and logical, and his thought processes showed no confusion or disorganization. He was not actively psychotic at the time of the examination nor, in Dr. Bosch's opinion, at the time he killed the two women on Jekyll Island. It was Dr. Bosch's opinion that on April 25, 1980, Waters was able to judge right from wrong and was not acting under the influence of a delusional compulsion. Ms. Bowman testified that she was unable to form an opinion as to whether Waters knew or did not know right from wrong on April 25, 1980.

Waters was sent to Central State Hospital in Milledgeville for additional evaluation. He was examined by Dr. Hosea M. Delatorre, the medical director of the forensic services division at the hospital, and Dr. Gerald Lower, the chief psychologist of the forensic services division.

Dr. Delatorre did not concur in the diagnosis of schizophrenia; his diagnosis was anxiety neurosis. He

testified that a person who feels anxious reacts differently than normal people, exaggerates his actions, and perhaps becomes violent at times, but is always in good contact with reality. In his opinion, Waters knew the difference between right and wrong at the time of the examination. Dr. Lower concluded that Waters knew the difference between right and wrong at the time of the offense.

Several lay witnesses, including Ben Rainey, Water's brother-in-law, and Bobby Gene Strickland, a long time friend of Waters, testified that Waters knew the difference between right and wrong.

THE GUILT-INNOCENCE PHASE

(1) Defendant claims the trial court erred in denying his motion for change of venue. When a defendant moves for a change of venue, a trial judge must "hear evidence by affidavit or oral testimony in support of or against the motion; and if, from the evidence submitted, the court shall be satisfied that an impartial jury cannot be obtained to try the case, the judge shall transfer it..." Code Ann. § 27-1201. Defendant's motion came on for a hearing December 2, 1980. Defendant presented testimony from representatives of the Florida Times Union, the Savannah Morning News and the Savannah Evening Press, the Brunswick News, and radio station WMOG. Thirty-five exhibits, consisting of articles from the newspapers and transcripts of radio broadcasts, were introduced into evidence. These accounts, most of which had apparently occurred several months prior to the hearing, were largely factual in

nature.[9] Compare Murphy v. Florida, 421 U. S. 794 (95 SC 2031, 44 LE2d 589) (1975). The State offered testimony from various witnesses, including several defense attorneys, that Waters could get a fair trial in Glynn County.

"The decision to grant a change of venue lies within the discretion of the trial court, and its discretion will not be disturbed absent an abuse of that discretion...The test adopted by this court in determining whether or not a change of venue should be granted is whether the jurors summoned to try the case have formed fixed opinions as to guilt or innocence from unfavorable pre-trial publicity." Patterson v State, 239 Ga. 409, 418 (238 SE2d 2) (1977). Accord, Messer v State, 247 Ga. 316(4) (276 SE2d 15) (1981); Jordan v. State, 247 Ga. 328(5) (276 SE2d 224) (1981).

This case was tried January 19 through January 24, 1981. Seventy prospective jurors were examined. Most of them had heard at least something about the killings on Jekyll Island and the subsequent search for the killer. However, only twenty entertained any opinion at all as to defendant's guilt; only sixteen were challenged by defendant for prejudice resulting from pre-trial publicity; and only ten were excused by the trial court because they had stated they would not be able to put aside any prejudice arising out of the pre-trial publicity and render a verdict based upon the evidence.[10] Only 22.9 per cent of the veniremen

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9/ The exhibits themselves were not included in the record on appeal. However, testimony concerning them, contained in the record, is sufficient to support the above assertions.

10/ Six jurors were disqualified because of their conscientious objections to the death penalty. One juror was disqualified because of his service on the grand jury that had indicted Waters. Two others were struck, because of an inability to decide the case based on the evidence, for reasons unrelated to pre-trial publicity: one was a friend of Ms. Culpepper and her family; the other had a niece who had killed her (the niece's) husband and spent time in a mental institution. Altogether 19 jurors were struck from the panel, leaving the parties with 51 prospective jurors

were challenged by the defendant for prejudice resulting from pre-trial publicity and only 14.3 per cent were excused because they had fixed opinions of defendant's guilt as a result of pre-trial publicity. Either percentage would corroborate the absence of prejudicial community bias and we conclude the trial court did not abuse his discretion in denying defendant's motion for change of venue. Messer v. State, supra.

(2) Defendant claims the trial court erred in refusing to disqualify five potential jurors because the answers they gave during voir dire showed them to be prejudiced as a result of pre-trial publicity.[11/]

All of the five jurors admitted they had formed a belief as to defendant's guilt based on newspaper articles or radio newscasts. None had either seen the crime committed or heard any evidence under oath. One said initially that the defendant would have to put up evidence to overcome her belief of his guilt.[12/] However, they all said they could put aside any preconceived notions they might have and decide the case based on the evidence presented and the law as charged to them by the court. Four of them, including the one who initially indicated the defendant would have to put up evidence, were informed of and indicated agreement with the defendant's presumption of innocence and the burden

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11/ As stated previously, defendant unsuccessfully challenged six jurors for prejudice resulting from pre-trial publicity. Defendant does not appeal from the trial court's ruling as to the last of those six, probably because the jury, including two alternates, was entirely selected before this sixth juror was reached.

12/ See, Young v. State, 131 Ga. App. 553(2) (206 SE2d 536) (1974).

of proof resting on the State.[13/]

"When a prospective juror has formed an opinion based on hearsay (as opposed to being based on his having seen the crime committed or having heard the testimony under oath), to disqualify such individual as a juror on the ground that he has formed an opinion on the guilt or innocence of a defendant, the opinion must be so fixed and definite that it would not be changed by the evidence or charge of the court upon the trial of the case." Tennon v. State, 235 Ga. 594 595-96 (220 SE2d 914) (1975). Accord, Taylor v State, 243 Ga. 222 (253 SE2d 191) (1979).

"Our strict rules as to juror disqualification for favor are offset by the large number of peremptory strikes allowed a defendant in most felony cases, 20 strikes for the defendant, 10 for the prosecution." Jordan v State, supra, 247 Ga. at 340.

The trial court did not err in refusing to grant defendant's challenges for cause.

(3) During voir dire, defendant's counsel asked one of the prospective jurors: "If the State's evidence shows that Mr. Waters did the shooting, and if he himself said he did the shooting, would you be willing to listen to any other evidence about how it could have happened? [the juror: If he states...] Say he wasn't in his right mind when he shot them, would you listen to that?" The State's objection to the question was sustained by the trial court. Defendant contends the trial court erred in so ruling.

13/ See, Goughf v State, 232 Ga. 178(1b) (205 SE2d 844) (1974). The questions about defendant's presumption of innocence and the burden of proof resting on the State were asked by the State and not objected to by the defendant. See division (3) of this opinion, infra.

Code Ann. § 59-705 outlines the permissible scope of voir dire. Jordan v. State, supra 247 Ga. at 339. Voir dire should allow both parties an opportunity to ascertain the ability of the prospective jurors to decide the case on its merits, with objectivity and freedom from bias and prior inclination. Whitlock v. State, 230 Ga. 700 (198 SE2d 865) (1973). However, no question should require a response from a juror which might amount to a prejudgment of the case. Jones v. Parrott, 111 Ga. App. 750(2) (143 SE2d 393) (1965). Since the distinction between questions which ask jurors how they would decide issues of a case if and when such issues are presented and questions which merely inquire whether jurors can start the case without bias or prior inclination is not always crystal clear, the "control of the voir dire examination is vested in the sound legal discretion of the trial judge and will not be interfered with by this court unless the record clearly shows an abuse of that discretion." Lamb v. State, 241 Ga. 10, 12 (243 SE2d 59) (1978).

Hypothetical voir dire questions are not per se improper, Atlanta Joint Terminals v. Knight, 98 Ga. App. 482(4) (106 SE2d 417) (1958), but a trial judge should be cautious in allowing counsel to propound questions which ask the juror to assume that certain facts will be proven. Such questions tend to improperly influence jurors. See, generally, 99 ALR2d 7, Anno: Jury Voir Dire-Hypothetical Question.

The question propounded was ambiguous and confusing. Defendant's counsel now contends he was merely trying to ascertain whether the juror would refuse to consider an

insanity defense regardless of the evidence or the charge of the court. However, the trial court, while sustaining the objection to the question as asked, informed counsel that he would be allowed to ask the juror if she would consider an insanity defense in light of the charge of the court, provided counsel did not attempt to predict what the evidence would show. Counsel chose not to ask the question in the manner suggested by the trial court. The juror did later state that she could decide the case based on the evidence presented and the law as charged by the court.[14/] We find no abuse of discretion and no merit to this enumeration of error.

(4) Defendant claims the trial court improperly sustained the State's objection to the following hypothetical question asked of Dr. Wiley Lewis, a medical doctor engaged in general practice in Waycross: "If the patient, Kelly Waters, on April 25, 1980, went up to two women whom he'd never seen before in a remote area of Jekyll Island, Georgia, caused them to be handcuffed together, caused them to lie down, caused one of them to undress from the waist down, committed oral sex with one of them, with that one, and then upon their flinching shot both of them with a .38 caliber revolver, what would be your opinion as to his mental condition?"

The State's objection was that the defendant was asking the witness to draw a conclusion based on facts with which the witness was not personally familiar. However, a witness who has qualified as a practicing physician is qualified to

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14/ This juror was one of the six challenged for cause by the defendant, but not excused. She was later peremptorily challenged by defendant and did not serve on the jury which convicted him.

testify as an expert witness on the question of sanity. Williams v. Trust Company of Ga., 180 Ga. 73(2) (178 SE 295) (1934); Petty v. Folson, 229 Ga. 477 (192 SE2d 246) (1972). The opinion of an expert "may be given on the facts as proved by other witnesses." Code Ann. § 38-1710. The question should have been allowed, and the trial court erred in sustaining the State's objection.

Later in the trial, the court told defendant's counsel that, after further consideration, he was not sure the question was improper and if counsel wanted to recall the witness and repeat the question the court would allow him to do so. Defendant was, in fact, allowed to ask virtually identical hypothetical questions of two other doctors. Dr. Lecumberri was unable to answer the question. Dr. Bosch responded that the question had two answers: the person knew what he was doing, or the person did not know what he was doing; either would be consistent with the hypothetical facts. After neither of these two witnesses could answer the hypothetical questions, defendant elected not to recall Dr. Lewis.

In view of defendant's failure to re-ask the question when provided an opportunity to do so, we find this enumeration of error to be without merit.

(5) Defendant contends the trial court improperly sustained the State's objection to a question propounded to Bobby Gene Strickland, a co-worker and friend of defendant for seven or eight years: "Now, the kind of fellow that you knew Kelly Waters to be, and from the length of time that you had known him, would you say that, in your opinion,

if he had kept the same faculties about him that you knew him to have and retained the same personality you knew him to have, do you think he was the kind of man that could have shot two women?"

Strickland had already testified that Waters had always acted normal to him; Strickland noticed nothing unusual about his behavior. Strickland testified Waters didn't drink much, never got into trouble; he was a well-behaved, accommodating, somewhat timid person. He subsequently testified that Waters was sane and knew the difference between right and wrong.

Defendant contends the question asked for an opinion as to his mental competence and that the court erred in sustaining the objection to the question because it kept the witness from expressing an opinion on a crucial point of Waters' defense of insanity. The State concedes a lay witness may ordinarily give his opinion as to the state of mind or mental condition of another, see, Dix v. State, 238 Ga. 209(2) (239 SE2d 47) (1977) and Jarrard v. State, 206 Ga. 112 (2,3,4,5) (55 SE2d 706) (1949), but argues a lay witness may not answer a hypothetical question incorporating facts not testified to by the witness. See, Callahan v State, 209 Ga. 211(2) (71 SE2d 86) (1952). 15/

We cannot agree that the question was improper because it incorporated facts not testified to by the witness. However, we do not agree with the defendant that the trial court erred in sustaining the State's objection to the question.

15/ The State's original objection was that the question called for an opinion on a matter not subject to opinion evidence. The State relied on Harris v. State, 188 Ga. 745(1) (45 SE2d 651) (1939) which says, "[t]he opinion of a witness is not admissible as evidence when all the facts and circumstances are capable of being clearly detailed and described, so that the jurors may be able readily to form their own conclusions therefrom."

Strickland could not give an opinion as to defendant's sanity at the time of the offense; he wasn't there, and a lay witness must testify from personal observation. He could, and did, testify that Waters was sane and acted normal prior to the murders. This, of course, was circumstantial evidence that Waters was sane at the time of the offense. It is apparent that the question was designed to show indirectly what could not be shown directly: that Waters was insane at the time of the offense. Defendant wished to show inferentially that since he was ordinarily not the kind of man that would shoot two women, he must have been insane when he did in fact shoot two women. The question did, therefore, as defendant contends, relate to his defense of insanity.

The question, essentially, was: "Was the Kelly Waters you knew the kind of man that could have shot two women?" The question calls for an opinion of the defendant's character. Character is circumstantial evidence of conduct and state of mind. McCormick on Evidence, Ch. 17, § 188 (2d Ed. 1972). A person is more likely to act in accord with his character than contrary to it. Green, Ga. Law of Evidence, § 65, p. 160. Thus a defendant may present evidence of his good character as a substantive fact indicative of his innocence. It may, by itself, create a reasonable doubt as to his guilt. Seymour v. State, 102 Ga. 803, 805 (30 SE 263) (1897).

However, the rule in Georgia is that good character may be proved only by testimony of a witness as to the reputation of the person whose character is in issue.

Powell v. State, 101 ga. 9 (29 SE 309) (1897); Wilson v. State, 190 Ga. 824(3) (10 SE2d 86) (1940). Subject to minor exceptions, the opinion of a witness as to character based on personal observation is not an approved way of introducing evidence of character. Agnor's Georgia Evidence, § 10-4, p. 166. Therefore, the trial court did not err in disallowing defendant's question calling for such an opinion.

(6) The trial court did not err in refusing to give defendant's request to charge on insanity. "The failure to give requested instructions in the exact language requested, where the charge given substantially covers the same principles, is not grounds for reversal." Kelly v. State, 241 Ga. 190(4) (243 SE2d 857) (1978).

(7) The trial court did not err in charging the jury on flight as evidence of guilt. That Waters did not remain at the scene of the offense is circumstantial evidence of his guilt and of his knowledge of his guilt. This is particularly true when coupled with his efforts to conceal evidence (throwing the purse into the river and spraying the gun with degreaser).

(8) The evidence presented at trial has been set out previously in great detail. The evidence supports the two guilty verdicts and the necessarily included finding by the jury that Waters was sane.

THE SENTENCING PHASE

After finding Waters guilty on both counts, the jury found three aggravating circumstances as to each murder. As to Count One of the Indictment (the murder of Anita Paseur), the jury found the murder was committed during the

commission of the capital felonies of kidnapping with bodily injury of Kathryn Culpepper, the murder of Kathryn Culpepper, and the aggravated sodomy of Kathryn Culpepper. As to Count Two of the Indictment (the murder of Kathryn Culpepper), the jury found the murder was committed during the commission of the capital felonies of kidnapping with bodily injury of Anita Paseur, the murder of Anita Paseur, and the aggravated sodomy of Kathryn Culpepper.[16/] The jury recommended the punishment of death as to each count.

(9) Defendant contends the trial court should not have charged kidnapping to the jury during the sentencing phase of the trial because there was no evidence to show a kidnapping occurred, in that there was no "abduction" or "stealing away."

"A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will." Code Ann. § 26-1311. The undisputed evidence showed that Waters forced two women at gunpoint to march 100 yards from their car to a woods. The evidence thus shows a kidnapping did occur. See Brown v. State, 132 Ga. App. 399(2) (208 SE2d 183) (1974); Carroll v. State, 143 Ga. App. 230 (237 SE2d 703) (1977); Rubiano v. State, 147 Ga. App. 142(2) (248 SE2d 207) (1978).

(10) The trial court did not err in failing to charge whether or not aggravated sodomy can constitute bodily injury, with respect to the aggravating circumstance of kidnapping with bodily injury, in the absence of a request

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16/ We are paraphrasing, not quoting, the findings of the jury. The aggravating circumstances were stated separately and tracked the language of the statute. See Code Ann. § 27-2534.1(b)(2).

for such a charge by the defendant or the jury. That Code Ann. § 26-1311 does not define "bodily injury" does not render that portion of the statute punishing kidnapping with bodily injury unconstitutionally vague. Peek v. State, 239 Ga. 422(4) (238 SE2d 12) (1977). A bodily injury includes any injury to the body. Since both victims of the kidnappings were killed, they received injuries to their bodies. The failure of the court to instruct the jury that an aggravated sodomy can constitute a bodily injury within the meaning of the kidnapping statute, Presnell v. State, 243 Ga. 131(1) (252 SE2d 625) (1979), could only have been beneficial to the defendant.

(11) Defendant contends aggravating circumstance number one of Count Two (alleging the murder of Kathryn Culpepper was committed while the offender was engaged in the commission of another capital felony, kidnapping with bodily injury to Anita Lynette Paseur) is not supported by the evidence. He says the only bodily injury received by Ms. Paseur was the gunshot wound that killed her and that her murder cannot constitute the bodily injury component of her kidnapping because aggravating circumstance number three of Count Two alleges that the murder of Ms. Culpepper was committed while the offender was engaged in the commission of another capital felony, the murder of Anita Paseur. Therefore, says defendant, one murder is used to support two aggravating circumstances. This contention is incorrect. Kidnapping with bodily injury and murder are two separate crimes, that is, one is not included in the other, even if the homicide is the bodily injury of the

kidnapping. Potts v. State, 241 Ga. 67 (11) (243 SE2d 510) (1978); Stephens v. Hopper, 241 Ga. 596(1) (247 SE2d 92) (1978); High v. State, 247 Ga. 289 (12) (276 SE2d 5) (1981); Brown v. State, 247 Ga. 298(9) (275 SE2d 52) (1981).

Since there is no bar to using the fatal injury to Ms. Paseur as the bodily injury component of the capital felony of kidnapping with bodily injury, even though the same fatal injury supports the capital felony of murder, it follows that aggravating circumstance number one of Count Two was supported by the evidence.

(12) The imposition of the death penalty for the murder of Kathryn Culpepper is supported by the aggravating circumstance that her murder was committed during the murder of Anita Paseur. The death penalty for the murder of Anita Paseur is supported by the aggravating circumstance that her murder was committed during the murder of Kathryn Culpepper. The two aggravating circumstances are therefore mutually supporting within the meaning of Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974). Compare Peek v. State, supra, 239 Ga. at 429; Strickland v. State, 247 Ga. 219 (23) (275 SE2d 29) (1981). One aggravating circumstance must be set aside. We arbitrarily eliminate the aggravating circumstance supporting the death penalty for the murder of Kathryn Culpepper, that the murder was committed during the murder of Anita Paseur.

(13) Two other aggravating circumstances, that the murders of Ms. Culpepper and Ms. Paseur were committed during the commission of another capital felony, the aggravated sodomy of Ms. Culpepper, must also be set aside. Code Ann. § 26-2002 (Ga. L. 1968, pp. 1249, 1299) provides

that a "person convicted of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years." While "capital felony" as that term is used in Code Ann. § 27-2534.1(b)(2) includes felonies which were capital crimes in Georgia at the time this section of our death penalty statute was enacted in 1973, even as to those offenses for which the death penalty may, as a result of judicial construction, no longer be imposed, Peek v. State, supra, the present aggravated sodomy statute has never provided for the death penalty. Code Ann. § 26-2002 provides for a maximum of life imprisonment. Thus, aggravated sodomy is not a "capital felony" in any sense of that term. Since it is not otherwise listed in § 27-2534.1(b)(2), it may not be used as a (b)(2) aggravating circumstance to support a death penalty.

(14) There remain the following aggravating circumstances: As to Count One of the Indictment (the murder of Anita Paseur), the murder was committed during the commission of two other capital felonies: Kidnapping with bodily injury of Kathryn Culpepper; murder of Kathryn Culpepper. As to Count Two of the Indictment (the murder of Kathryn Culpepper), the murder was committed during the commission of another capital felony: kidnapping with bodily injury of Anita Paseur.

SENTENCE REVIEW

The death penalties imposed in this case must be reviewed by this court under the standard set forth in Code Ann. § 27-2537(c)(1-3). Thus, we must determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

whether the evidence supports the jury's finding of the statutory aggravating circumstances; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

15. Upon review of the entire transcript and record in this case, this court concludes that the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor.

16. The evidence supports a finding of the aggravating circumstances as set forth in division 14, by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). Although for reasons noted in divisions 12 and 13, we have set aside three aggravating circumstances found by the jury, the failure of one or more aggravating circumstance does not taint the proceeding so as to invalidate the other aggravating circumstances found by the jury in the sentence of death based thereon. Burger v. State, 247 Ga. 698 (SE2d) (1981).

17. We have reviewed the trial court's charge to the jury and find it is not subject to the defects dealt with in Hawes v. State, 240 Ga. 327(9) (240 SE2d 833) (1977), and Fleming v. State, 240 Ga. 142(7) (240 SE2d 37) (1977). Here the charge included application of mitigating circumstances and informed the jury they could recommend life sentences even if they found the existence of a statutory aggravating circumstance.

(18) In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which death or life sentences were imposed and find that similar cases listed in the appendix attached hereto support the affirmance of the death penalties in this case.

Defendant contends the death penalties should be set aside because the murders occurred at a time when he was under no medication, was drinking alcohol and was alone at a remote fishing spot with a pistol and handcuffs and encountered two women. Defendant contends that some emotional force was acting upon him that was sufficient to dethrone his reason and silence his inhibitions. He contends that for the good of society he ought to be allowed to live so that his particular personality can be studied. We disagree. The evidence clearly shows that Waters was not incapacitated or unable to form the requisite criminal intent. Aside from the medical testimony as to his competence, we note that Waters came to the beach with his pistol and a pair of handcuffs and approached at least one other woman before he kidnapped and murdered the victims in this case. He fled the scene immediately after the murders, discarded the pocketbook he stole and took the time after he got home to clean and reload his gun.[17] "Juries have given the death penalty in cases in

[17] There is also evidence that someone had tampered with the barrel of the gun in a way that would hamper a ballistics comparison. Waters was at one time a jailer for the city of Waycross.

which the defendant had no prior criminal record and where evidence of use of alcohol or drugs was offered in mitigation." Tucker v. State, 244 Ga. 721 (13) (261 SE2d 635) (1979). See also Strickland v. State, 247 Ga. 219 (SE2d) (1981); Bowen v. State, 244 Ga. 495 (260 SE2d 855) (1979); House v. State, 232 Ga. 140 (205 SE2d 217) (1974); Johnson v. State, 226 Ga. 511 (175 SE2d 840) (1970).

We conclude that defendant's sentences of death are not excessive or disproportionate to the penalty imposed in similar cases, taking into consideration both the crime and the defendant.

Judgment affirmed. Jordan, C.J., Marshall, Clarke and Smith, JJ., concur. Hill, P. J., concurs in the judgment only as to Divisions 11 and 14.

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APPENDIX

Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975); Gibson v. State, 236 Ga. 874 (225 SE2d 63) (1976); Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978); Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978); Johnson v. State, 242 Ga. 649 (250 SE2d 394) (1978); Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979); Brooks v. State, 244 Ga. 574 (261 SE2d 379) (1979); Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Justus v. State, 247 Ga. 276 (SE2d) (1981); Blankenship v. State, 247 Ga. 587 (SE2d) (1981).

APPENDIX B

This case involves the following provisions of the Code of Georgia:

Ga. Code Ann. §26-702

Mental capacity; insanity

A person shall not be found guilty of a crime, if at the time of the act, omission, or negligence constituting the crime, such person did not have mental capacity to distinguish between right and wrong in relation to such act, omission or negligence.

Ga. Code Ann. §26-1101

Murder

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart....

* * *

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Ga. Code Ann. §26-1311

Kidnapping

(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

* * *

(b) A person over the age of 17 commits kidnapping when he forcibly, maliciously, or fraudulently leads, takes, or carries away, or decoys or entices away, any child under the age of 16 years against the will of the child's parents or other person having lawful custody.

A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death.

Ga. Code Ann. §26-2002

Sodomy; aggravated sodomy

A person commits sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits aggravated sodomy when he commits sodomy with force and against the will of the other person. A person convicted of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

Ga. Code Ann. §26-3102

Capital offenses; jury verdict and sentence where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstances is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstances and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

Ga. Code Ann §27-401

Who may hold courts of inquiry

Any judge of the superior or county court, or justice of the peace, or city or town officer, who may be ex-officio justice of the peace, may hold a court of inquiry to examine into an accusation against a person legally arrested and brought before him. The time and place of such inquiry shall be determined by him.

Ga. Code Ann. §27-402

Associates of officer holding court of inquiry

The officer before whom the accused is brought may associate with him, in the investigation, one or more justices of the peace; in which event a majority shall decide all questions. If there are only two presiding, the original justice shall determine all the questions where the court is not agreed.

Ga. Code Ann. §27-403

Time granted parties for preparation of case; bail

A reasonable time shall be given to the defendant or prosecutor for the preparation of his case, and in no event shall the defendant be forced to trial without the aid of counsel, if there be a reasonable probability of his securing counsel without too great delay. Where the cause is postponed to a future day at the instance of either party, or by the court, it shall not be necessary to commit the defendant to jail pending the hearing; but he shall have the right to give bail for appearance at the hearing before said court of inquiry, if the offense is bailable under the authority of said court.

Ga. Code Ann. §27-404

Attendance of witnesses

A court of inquiry shall have power to compel the attendance of all witnesses resident within the county, after notice of 24 hours, and to this end may order their arrest.

Ga. Code Ann. §27-405

Evidence; testimony of defendant

The court shall hear all legal evidence submitted by either party. If the prisoner wishes to testify and announces in open court before any court of inquiry his intention to do so, he may so testify in his own behalf. If he so elects, he shall be sworn as any other witness and may be examined and cross-examined as any other witness, except that no evidence of general bad character or prior convictions shall be admissible unless and until the defendant shall have first put his character in issue. The failure of a defendant to testify shall create no presumption against him, and no comment shall be made because of such failure.

Ga. Code Ann. §27-406

Abstract of evidence in felony cases

If the charge be of a felony, the court shall cause an abstract of all the evidence to be made and returned as above.

Ga. Code Ann. §27-407

Rule of decision; commitment of accused

The duty of the court of inquiry is simply to determine whether there is sufficient reason to suspect the guilt of the accused, to require him to appear and answer before the court competent to try him; and whenever such probable cause exists, it is the duty of the court to commit. Any court, other than a superior court or state court, to which any charge of a violation of section 26-2901 or section 26-2903 is referred for the determination required by this section shall thereafter have and exercise only the jurisdiction of a court of inquiry with respect to said charge and with respect to any other criminal violation arising from the transaction on which said charge was based and shall not thereafter be competent to try the accused for said charge or for any other criminal violation arising from the transaction on which said charge was based, irrespective of the jurisdiction that the court otherwise would have under any other law.

Ga. Code Ann. §27-1101

County where crime was committed; exception

All criminal cases shall be tried in the county where the crime was committed, except cases in the superior courts where the judge is satisfied that an impartial jury cannot be obtained in such county. When he becomes thus satisfied, he may change the venue for the trial.

Ga. Code Ann. §27-1201

When and how venue changed

The defendant in any criminal case wherein trial by jury is provided may move, by petition in writing, for a change of venue, whenever, in his judgment, an impartial jury cannot be obtained in the county where the crime is alleged to have been committed. Upon the motion it shall not be necessary to examine all persons in the county liable to serve on juries, but the judge shall hear evidence by affidavit or oral testimony in support of or against the motion; and if, from the evidence submitted, the court shall be satisfied that an impartial jury cannot be obtained to try the case, the judge shall transfer it to any county that may be agreed upon by the prosecuting attorney and the defendant or his counsel, to be tried in the county agreed upon. If a county is not thus agreed upon, the judge shall select such county as, in his judgment, will afford a fair and impartial jury to try the case, and have it transferred accordingly. The judge of the court wherein whose jurisdiction a crime is alleged to have been committed may change the venue for trial of said case, on his own motion, with or without petition, whenever, in his judgment, there is danger

of violence being attempted to be committed on said accused, if carried back, or allowed to remain in the county where the crime is alleged to have been committed. If a motion by petition shall be made by the accused for a change of venue, said judge shall hear the same at such time and place as he may direct; and if the evidence submitted shall reasonably show that there is probability or danger of violence, then it shall be mandatory on said judge to change the venue to such other county as, in his judgement, will reasonably avoid violence.

Ga. Code Ann. §27-2503

Presentence hearings in felony cases

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534-1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty be the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534-1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

Ga. Code Ann. §27-2534.1

Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: . . . . .

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree .....

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Ga. Code Ann. §27-2537

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

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No. 81-5947

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EURUS KELLY WATERS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

ERASABLE

— COTTON CONTENT —

[illegible]
165 West End Avenue
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Attorney for Petitioner

SUPPLEMENTAL BRIEF FOR PETITIONER

In his petition for a writ of certiorari, petitioner asserted that the Supreme Court of Georgia erred in affirming his death sentence despite a finding that three of the total of six aggravating circumstances considered and found by the sentencing jury were invalid. (Point III). Petitioner's claim is directly affected by this Court's decision in Zant v. Stephens, 50 L.W. 4472 (5/3/82) remanding a case similarly involving multiple aggravating circumstances to the Supreme Court of Georgia for explanation of the state law premises of that court's view that a death sentence can stand despite invalid aggravating circumstances as long as one valid statutory factor was found.

Petitioner received a death sentence on each of two counts of murder. As to both sentences, the jury was told that it could consider as an aggravating circumstance the sodomy alleged to have been committed on one of the victims. The jury was further permitted to consider as mutually supporting aggravating circumstances the killing of each victim during the course of the killing of the other. The Supreme Court of Georgia declared the sodomy aggravating circumstance invalid as to each count, and arbitrarily eliminated one of the mutually supporting aggravating circumstances. Waters v. State, 248 Ga. 355, 283 S.E.2d 238, 250, 251 (1981). The court nonetheless affirmed the death sentences, relying on the single remaining aggravating circumstance for one count and the two aggravating circumstances found valid for the other. Id., 283 S.E.2d at 251.

Since the ultimate determination by this Court of the constitutionality of such action will be determinative of petitioner's claim, petitioner respectfully requests that his petition for

ERASABLE
— COTTON CONTENT —

a writ of certiorari be held in abeyance pending final decision in Zant v. Stephens.

May 14, 1982

Respectfully submitted,

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SPHINX
ERASABLE
— COTTON CONTENT —

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ALEXANDER L. STEVAS,
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OCTOBER TERM, 1981

EURUS KELLY WATERS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether this Court should grant the writ of certiorari to review two issues which were not properly raised or ruled upon in the Georgia Supreme Court?

II.

Whether the Georgia Supreme Court properly affirmed the denial of Petitioner's motion for change of venue?

III.

Whether the existence of valid statutory aggravating circumstances supporting Petitioner's death penalty, in addition to those which were vacated by the Georgia Supreme Court, renders harmless any error in submitting the invalid statutory aggravating circumstances to Petitioner's trial jury?

IV.

Whether, under the facts of this case, Petitioner's death penalty constitutes cruel and unusual punishment?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Eurus Kelly Waters was indicted on May 13, 1980 by the Glynn County, Georgia Grand Jury for the murders of Anita Lynette Paseur and Kathryn Ann Culpepper. (R. 3, 4).[1/] Petitioner was tried on January 19-24, 1981, was found guilty on two counts of murder and received the death penalty as to each count. (R. 65-69). Petitioner's convictions were affirmed on direct appeal to the Georgia Supreme Court. Although said court vacated three of the six of Petitioner's statutory aggravating circumstances it affirmed his death penalties under the remaining statutory aggravating circumstances. Waters v. State, 248 Ga. 355, ___S.E.2d___ (Oct. 8, 1981), rehng. den., (Oct. 27, 1981).

1/ References to the pagination of the official record from Petitioner's trial in the Superior Court of Glynn County, Georgia shall be referred to in this brief as (R. ___). References to the pagination of Petitioner's trial transcript shall be referred to as (T. ___).

PART TWO

STATEMENT OF THE FACTS

A detailed account of the evidence which was produced at Petitioner's trial, and which authorized his convictions and death sentences, is set out in the opinion of the Georgia Supreme Court. Waters v. State, supra. The evidence was overwhelming.

The state's material evidence was undisputed. Petitioner Waters did not work as a cab driver on April 25, 1980, although he did take his wife to her job. (T. 695, 1110, 1131). Shortly after lunch, Petitioner was seen in the north picnic area on Jekyll Island. (T. 647-649). Later Petitioner drove his 1974 white Chevrolet to the New Marina area of Jekyll Island. (T. 1152, 1153).

Holding a revolver, Petitioner got out of his car when he saw Anita Paseur and Kathryn Culpepper walking from the beach toward their red car. (T. 1154, 1155, 1161). He forced them to walk approximately 100 yards into the woods at gunpoint. (T. 637, 1155-1156, 1163). Petitioner ordered the women to handcuff themselves together, which they did. (T. 637, 1156, 1163). Kathryn Culpepper was ordered to undress and Petitioner orally sodomized her while sixteen year old Anita Paseur was hysterically screaming. (T. 1156, 1157, 1164). Mrs. Culpepper redressed and both unarmed women allegedly attempted to lunge at Petitioner Waters. (T. 1158, 1165). Petitioner fired two shots at close range. (T. 1158, 1165, 1179). Kathryn Culpepper was struck by a bullet and fell backwards. (T. 1158, 1165). Anita Paseur was also shot but Petitioner nevertheless ripped at her clothing. (T. 789, 1159, 1166).

Petitioner Waters left both women for dead. (T. 1158, 1180). As Petitioner walked by the red car, he took Mrs. Culpepper's purse from the front seat and drove away. (T. 1159, 1167).

Kathryn Culpepper released the handcuff from Anita Paseur's wrist and drove to a nearby gas station for help. (T. 633, 635). Mrs. Culpepper gave a description of Petitioner and related the facts of the incident. (T. 637, 638, 643-644). An ambulance took Mrs. Culpepper to the Glynn-Brunswick Memorial Hospital where she subsequently died as a result of the gunshot wound. (T. 638, 672).

Ms. Paseur's lifeless body was found in the New Marina area lying on her back with a bullet wound in the breast. (T. 645-646, 759-760). Her clothing was torn and there was a bruise on her right wrist as a result of being handcuffed. (T. 760, 762). The cause of death was a gunshot wound to the chest. (T. 673-680).

Brantley County Deputy Sheriff Jerry Rowell was patrolling the Satilla River Bridge on Highway 84 at approximately 4:30-5:00 p.m. on April 25, 1980. (T. 653-654, 657). Officer Rowell stopped Petitioner's vehicle for D.U.I. (T. 655, 657). Petitioner pulled his car to the wrong side of the road and tossed Kathryn Culpepper's purse over the bridge when he observed the patrol car's flashing blue light. (T. 658, 788, 1159-1160, 1169). However, officer Rowell did not see Petitioner throw the purse away and released him. (T. 659, 660).

Four days after the incident, Petitioner's wife read a newspaper account of the murder and realized the assailant's description fit that of her husband. (T. 1118-1119, 1133-1134, 1136). Family members met with Petitioner who stated "I think I may have killed some people." (T. 1087, 1121, 1133). On

Sunday, May 4, 1980, Officer Ed Dixon of the Glynn County Police Department met with the family and was given the murder weapon. (T. 718-719, 1095-1097).

GBI Special Agent Scott Curley received the revolver on May 5, 1980. (T. 765). At approximately 2:25 p.m. Agent Curley picked up Petitioner at his home and they drove to the patrol station for questioning. (T. 774). After being read his Miranda rights, Petitioner gave officers permission to obtain his clothing, ammunition and holster as evidence of the murders. Petitioner Waters was placed under arrest and charged with two counts of murder. (T. 782). Petitioner was again read his Miranda rights. (T. 782). Petitioner made a voluntary statement to law enforcement officers that he shot both Kathryn Culpepper and Anita Paseur, and he related the events of April 25, 1980. (T. 786-790).

Petitioner's defense was insanity. Since 1978 he had been taking medication for agitation and restlessness. (T. 873, 916). Psychiatrist Dr. Lorenzo Lecumberri stated Petitioner was in good contact with reality in September 1979 and knew the difference between right and wrong. (T. 950, 953, 956-957). Petitioner was oriented and functioning well when seen at the Waycross Mental Health Clinic for medication monitoring on March 19, 1980. (T. 881, 917).

Petitioner participated in a complete physical and neurological examination as well as psychiatric evaluation after the murders of Kathryn Culpepper and Anita Paseur. (T. 973-974, 994-995, 1013-1015). Petitioner was aware of his behavior on April 25, 1980, knew right from wrong, and was not psychotic. (T. 996-997, 1003, 1189-1190). Petitioner was in good contact with reality. (T. 1016-1017).

Petitioner Waters testified at trial and did not deny shooting the unarmed women at close range. (T. 1161, 1179). Petitioner testified he had not taken his medication for a week prior to the murders and had been drinking alcohol. (T. 1152, 1170, 1181). All rebuttal witnesses testified that Petitioner appeared to be normal and knew right from wrong. (T. 1184, 1185-1186, 1187, 1189).

Other facts will be developed, as necessary, in the discussion of Respondent's argument and citation of authority.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. SINCE PETITIONER HAS FAILED TO PROPERLY RAISE, IN THE GEORGIA SUPREME COURT, THE FEDERAL QUESTIONS WHICH HE NOW RAISES UNDER HIS FIRST AND FOURTH ARGUMENTS URGING ISSUANCE OF THE WRIT, THIS COURT SHOULD NOT GRANT THE WRIT OF CERTIORARI TO REVIEW SAID ISSUES.

Petitioner's first argument urging issuance of the writ in the instant case, contends that Petitioner's constitutional rights were violated and his conviction should be vacated, because he was allegedly not afforded counsel at a committal hearing prior to indictment. Petitioner admits this issue was not raised on appeal to the Georgia Supreme Court. Petitioner's fourth argument asserts that the writ should be granted to review the sufficiency of the trial court's instructions during the sentencing phase of Petitioner's trial, particularly pertaining to instructions

on mitigating circumstances. Petitioner contends that the instructions failed to define mitigating circumstances, gave no examples of mitigating circumstances, failed to instruct the jury to particularly consider the relevant aspects of the defendant's character, and finally, failed to give the jury proper guidance in regards to the proper relationship between aggravating and mitigating factors. Contrary to Petitioner's contention, these issues are being specifically raised for the first time in this petition. Pertaining to instructions on mitigating circumstances, the Georgia Supreme Court did review sua sponte the question of whether or not the jury was properly instructed that it could impose a life sentence even though it found the existence of statutory aggravating circumstances. Waters v. State, 248 Ga. at p. 369-370, citing Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977) and Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977). However, the aforesaid specific issues which Petitioner raises under the fourth argument in the instant application for a writ of certiorari, were not raised by Petitioner in the Georgia Supreme Court, nor were they specifically addressed by said court.

This Court has consistently ruled that federal constitutional issues raised for the first time on appeal from a state court decision will not be reviewed. Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1163, 22 L.Ed.2d 398 (1969); Tacon v. Arizona, 410 U.S. 351, 93 S.ct. 998, 35 L.Ed.2d 346 (1973); also see, 28 U.S.C. § 1257. Thus, since the federal questions have not been properly raised, preserved or passed upon in the state Supreme Court below, this Court should decline to accept jurisdiction to review Petitioner's first or fourth arguments.

II. THE GEORGIA SUPREME COURT PROPERLY AFFIRMED THE TRIAL COURT'S RULING DENYING PETITIONER'S MOTION FOR A CHANGE OF VENUE.

A review of the record in this case amply supports the Georgia Supreme Court's affirmance of the trial court's denial of Petitioner's motion for a change of venue. The murders in this case were committed on April 25, 1980, but Petitioner was not tried until January 19, 1981. (R. 3, T. 1). Petitioner's attorneys filed a motion for a change of venue, and the trial court conducted a hearing thereon on December 2, 1980.[2/] Petitioner's evidence in support of his motion was weak. For example, he presented testimony and newspaper clippings pertaining to articles which were written by three newspapers whose circulation included the Glynn County area. (MV. 1-45). Mr. Brent Green from the Florida Times Union testified that his circulation in Glynn County, which he estimated to contain approximately forty thousand people, varied from 2,098 during the weekdays to approximately 4,000 on Sundays. (MV. 5, 8). During the nine month period between the time of the murders and the hearing, the Florida Times Union printed only fifteen articles relating to Petitioner's case. Witness John Harmon of the Savannah Morning and Evening News testified that they had approximately 600 subscribers and sold approximately 1,000 papers per day in Glynn County. Mr. Harmon testified that his paper ran only seventeen articles pertaining to Petitioner's case between the date of the murder and the hearing, and

2/ References to the pagination of the transcript of Petitioner's December 2, 1980 motion for change of venue hearing shall be referred to as (MV.___).

from approximately the middle of May through October there were no articles written. (MV. 19, 27-29).

Witness Barry Inman, a reporter with the Brunswick News, likewise testified that his paper ran only seventeen articles on the incident. His paper had a circulation of 13,751. (MV. 33). Mr. Inman further testified that none of the seventeen articles were even on the front page of his paper.

Petitioner has over emphasized the report of the defendant's confession. For example the reference in the Savannah Morning and Evening News and in the Brunswick News to Petitioner's confession only indicated that the Petitioner had made a confession, but gave no details of the statement. (MV. 23-24, 39). Petitioner's own references to the various newspaper articles indicate that they were published shortly after the incident and Petitioner's arrest.

Likewise, Petitioner's references to the radio broadcast failed to show sufficient publicity which would have justified the granting of a motion for change of venue. A review of the radio announcements indicates that they were strictly factual, and were not inherently prejudicial to Petitioner. The same information which was released in the broadcasts was testified to at trial. As with the newspaper articles, the radio broadcasts occurred in April and early May. Finally, Petitioner's references to the security measures at trial simply demonstrated that the sheriff had taken prudent measures to protect the Petitioner's security. (MV. 64-72). The sheriff indicated that he had observed no problems with security, could provide adequate security at trial, and there was no danger of any mob action against the Petitioner. (MV. 70-72). The state put up numerous

witnesses whose testimony established that Petitioner could receive a fair and impartial trial in Glynn County, and that the pretrial publicity would have little or no influence on the availability of an impartial jury.

As is detailed by the Georgia Supreme Court in its opinion in this case, the jury voir dire also showed that only ten jurors out of seventy were excused for cause because of prejudicial pretrial publicity, and the remaining jurors expressed either no preconceived opinion, or indicated that they could set aside their preconceived notions and decide the case based upon the evidence presented and the law as charged.

It appears that in order to find that a criminal defendant did not receive a fair trial because of pretrial publicity, he must show: (1) that the jury selection process demonstrated actual prejudice resulting from the pretrial publicity, or (2) the setting of the trial was so inflammatory or prejudicial as to render virtually impossible a fair trial by an impartial jury drawn from the community. Under this latter circumstance, prejudice may be presumed. See, United States v. Capo, 595 F.2d 1086, 1090 (5th Cir. 1979), cert. den., 444 U.S. 1012 (1980); Mayola v. State of Alabama, 623 F.2d 992, 996-997 (5th Cir. 1980). Neither of these situations was involved in the instant case. Here, there was no such total inundation of the judicial process by publicity as was found in cases such as Estes v. Texas, 381 U.S. 532, 95 S.Ct. 1628, 14 L.Ed.2d 543 (1965) or Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In Estes and Sheppard, the publicity saturated the immediately surrounding community with articles concerning the crime, and the news media also controlled the courtroom creating a "carnival atmosphere" during

the trial. In Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963) prejudice was presumed; however, the defendant had personally confessed in a televised interview which was broadcast three times in the same Louisiana parish where the defendant had been tried. Such was not the case at Petitioner's trial. As noted previously, the reference to Petitioner's confession was only that, and contained no details of his statements.

In Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), this Court stated that the proper test for an individual prospective juror, is whether that juror "can lay aside his impression or opinion and render a verdict based upon the evidence presented in the court." In formulating this test, this Court noted:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interests of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." Id.

The defendant has a right to a fair trial, free from emotionalism and sensationalism; however, jurors need not be totally ignorant of the facts and issues involved. Murphy v. Florida, 421 U.S. 794, 799-800, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).

Contrary to Petitioner's assertions, it is clear that the Georgia Supreme Court did take into consideration both the jury voir dire and the evidence presented at the motion for change of venue hearing. See Waters v. State, supra, 248 Ga. at p. 360-361.

Since Petitioner was unable to show either actual prejudice because of the pretrial publicity, or an influx of pretrial publicity which demonstrated that the atmosphere in the community was such that a fair trial was impossible so as to presume prejudice, the Georgia Supreme Court was correct in affirming the denial of Petitioner's motion for change of venue. Thus, this Court should decline to grant the writ of certiorari to review Petitioner's second argument pertaining to the denial of his motion for change of venue.

III. SINCE THE GEORGIA SUPREME COURT FOUND THAT PETITIONER'S DEATH PENALTY WAS AMPLY SUPPORTED BEYOND A REASONABLE DOUBT BY THE EXISTENCE OF ADDITIONAL STATUTORY AGGRAVATING CIRCUMSTANCES BESIDES THOSE WHICH HAD BEEN VACATED BY SAID COURT IN ITS APPELLATE REVIEW, ANY ERROR IN SUBMITTING THE INVALID STATUTORY AGGRAVATING CIRCUMSTANCES TO THE JURY WAS HARMLESS BEYOND ALL REASONABLE DOUBT.

As noted by the Georgia Supreme Court in its opinion on Petitioner's direct appeal, the jury found three aggravating circumstances supporting the death penalty for each of the murders. Under Count One of the indictment charging Petitioner with the murder of Anita Paseur, the jury found the following aggravating circumstances: (1) that the murder was committed while Petitioner had been engaged in the commission of another capital felony, to wit: the kidnapping with bodily injury of Kathryn Ann Culpepper; (2) that the murder was committed while the Petitioner had been engaged in the commission of another capital felony, to wit: the murder of Kathryn Ann Culpepper; and (3) that the murder was committed while the Petitioner had been engaged in another capital felony, to wit: the aggravated sodomy of Kathryn Ann Culpepper.

As to Count Two of the indictment, charging Petitioner with the murder of Kathryn Ann Culpepper, the jury found as statutory aggravating circumstances that: (1) the murder was committed while the Petitioner had been engaged in the commission of another capital felony, to wit: the kidnapping with bodily injury of Anita L. Paseur; (2) that the murder was committed while the Petitioner had been engaged in the

commission of another capital felony, to wit: the murder of Anita L. Paseur; and (3) the murder was committed while the Petitioner had been engaged in another capital felony, to wit: the aggravated sodomy of Kathryn Ann Culpepper.

Upon reviewing these statutory aggravating circumstances, the Georgia Supreme Court first observed that two of the statutory aggravating circumstances [the murder of Kathryn Culpepper having been committed during the murder of Anita Paseur, and the murder of Anita Paseur having occurred during the murder of Kathryn Culpepper] were mutually exclusive, and thus under the authority of Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), the court vacated one of the aggravating circumstances. Thus, the court eliminated the aforesaid second aggravating circumstance supporting the Petitioner's death penalty for Kathryn Culpepper's murder, that being that her murder was committed during the course of the murder of Anita Paseur. Waters v. State, supra, 248 Ga. at p. 368.

Additionally, the Georgia Supreme Court recognized that aggravated sodomy was not a "capital felony" within the (b)(2) statutory aggravating circumstance under Ga. Code Ann. § 27-2534.1.[3/] Thus, the Georgia Supreme Court vacated the aforesaid third aggravating circumstance supporting both Ms. Culpepper's and Ms. Paseur's murders. Petitioner argues that since the aggravated sodomy aggravating circumstance was found to have been erroneously imposed, then as a matter of law, Petitioner's death penalty should be vacated, because

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3/ A jury may impose the death penalty under Ga. Code Ann. § 27-2534.1(b)(2) if it finds that: "The offense of murder . . . was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arsen in the first degree."

it would be unclear as to whether or not the jury would have recommended the death penalty solely upon the finding of the remaining, valid aggravating circumstances. A similar issue is now before this Court in Zant v. Stephens, Case No. 81-89. See, Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), amended en banc, 648 F.2d 446 (5th Cir. 1981); Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978), cert. den., 439 U.S. 991 (1978). Since this Court's ruling in Zant v. Stephens, supra, may have a direct and immediate bearing upon the instant case, the Court may wish to delay the ultimate decision as to whether certiorari should be granted here, until after the decision in Stephens, supra.

Of course, in addition to Stephens v. Hopper, supra, there are numerous other Georgia death penalty cases which hold that following a finding of two or more statutory aggravating circumstances supporting a death penalty, each of which having been established beyond a reasonable doubt, the death penalty should not be vacated because one of the statutory aggravating circumstances is later set aside. See, e.g., Hamilton v. State, 246 Ga. 262, n. 1, 271 S.E.2d 173 (1981), cert. den., 446 U.S. 961, rehng. den., ___U.S.___, 101 S.Ct. 1530 (1981); Burger v. State, 245 Ga. 458, 460-461, 265 S.E.2d 796 (1980), cert. den., 446 U.S. 988 (1980); Dampier v. State, 245 Ga. 427, 883, n. 1, 265 S.E.2d 565 (1980), cert. den., 449 U.S. 938 (1980); Fair v. State, 245 Ga. 868, 880, n. 1, 268 S.E.2d 316 (1980), cert. den., ___U.S.___, 101 S.Ct. 407 (1980), rehng. den., ___U.S.___, 101 S.Ct. 903 (1981). Such rulings by the Georgia Supreme Court are in recognition of the mutual exclusiveness of the statutory aggravating circumstances listed under Ga. Code Ann. § 27-2534.1 (b). Here, the jury's findings on the statutory aggravating

circumstances was based upon evidence that was properly admitted during Petitioner's trial. Even though the Georgia Supreme Court invalidated the aforesaid aggravating circumstances, the jury still had before it, all of the evidence which supported their findings of aggravated sodomy and murder. The jury's recommendation for the death penalty was not, and need not have been based solely upon the statutory aggravating circumstances, but was based upon all of the evidence before it in aggravation and in mitigation of punishment. The statutory aggravating circumstances, of course, are a prerequisite element which guides the jury's verdict; however, the jury may consider and may ultimately be swayed by other factors which it certainly is authorized to consider. Absent the removal of some material piece of evidence in aggravation or mitigation of punishment which was considered by the jury, the setting aside of less than all of the statutory aggravating circumstances found by the jury beyond a reasonable doubt, would have absolutely no effect on the process of jury deliberation in reaching or recommending an appropriate punishment.

Petitioner's reliance upon the principles announced in Stromberg v. California, 238 U.S. 359, 367-368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) is erroneous. A review of Stromberg demonstrates that the jury in that case had returned a general verdict of guilty, which could have rested upon either of three grounds, one of which was clearly impermissible. Because the verdict returned was a general one, it was impossible to determine whether the jury's verdict rested upon the unconstitutional ground since the jury had been instructed in the disjunctive. Similar circumstances were also addressed

in Street v. New York, 394 U.S. 576, 585-588, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). Actually, there is language in Street which supports Respondent's argument that the existence of a separate, distinct and unchallenged aggravating circumstance found by the jury beyond a reasonable doubt, negates any need to grant certiorari to review Petitioner's case. In Street, this Court noted the danger recognized and addressed under the Stromberg principle, is not relevant in a situtation where the jury makes separate and distinct findings supporting their verdict.

> "There is no comparable hazard when the indictment or information in several counts and the conviction is explicitly declared to rest on findings of guilt on certain of these counts, for in such instances, there is positive evidence that the trier of fact considered each count on its own merits and spearately from the others." Street v. New York, 394 U.S. at p. 588.

Thus, since three of the six statutory aggravating circumstances were invalidated on legal grounds, and not because of the sufficiency of the evidence; this should not proscribe the imposition of Petitioner's death sentence based upon other separate, independent statutory aggravating circumstances found to exist by the jury beyond a reasonable doubt. Petitioner's third argument should be found to be unmeritorious.

IV. PETITIONER'S DEATH PENALTY DOES NOT CONSTITUTE CRUEL OR UNUSUAL PUNISHMENT UNDER THE FACTS OF THIS CASE.

A review of the Georgia Supreme Court's opinion reveals that the Court did consider all of the evidence at Petitioner's trial in affirming his death penalty, including medical testimony as to Petitioner's competence, and other testimony pertaining to his mental problems and condition. Although in the brief presented to this Court, Petitioner alleges a "black out" during the entire episode nevertheless, he made a full confession to the police pertaining to the details of the murders and testified to same during the trial. In its evaluation of the case, the Georgia Supreme Court noted that in addition to the medical testimony attesting to Petitioner's competence, there was evidence that the Petitioner came to the beach prepared to carry out his plan. He carried a pistol, a pair of handcuffs, and approached at least one other woman before he kidnapped and murdered the victims in this case. After fleeing the scene, he discarded the pocketbook which he stole, returned home to clean and reload his gun.

In conclusion, the facts of this case demonstrate a planned sexual attack which ultimately resulted in the death of two innocent women. The defendant was competent during the incident, knew right from wrong, and should now be held to suffer the penalty imposed for his unpardonable actions. This Court should find Petitioner's fifth argument to be totally without merit.

CONCLUSION

For all of the aforesaid reasons, Petitioner's request for a writ of certiorari should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent, upon counsel for Petitioner, by depositing a copy of same in the United States mail, with sufficient postage affixed thereon, and addressed to:

Ms. Ursula Bentele
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This 28th day of January, 1982.

Nicholas G. Dumich

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